

Chapter XV.

POLYGAMY AND OTHER CRIMES AS DISQUALIFICATIONS.

1. Cases of Whittemore, Connor, and Acklen. Sections 464–466.¹
 2. The polygamy cases of 1868, 1873, and 1882. Sections 467–473.
 3. The case of Brigham H. Roberts. Sections 474–480.
 4. The Senate case of Reed Smoot. Sections 481–483.²
 5. Incidental opinion of a House committee. Section 484.
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464. B. F. Whittemore, being reelected to the same House from which he had resigned to escape expulsion for crime, was excluded from taking the oath and his seat.—On June 18, 1870,³ the Speaker laid before the House the credentials of Mr. B. F. Whittemore, of South Carolina, who had been chosen at a special election to fill the vacancy caused by expulsion proceedings taken by the House against him at an earlier period in this session.⁴ Mr. John A. Logan, of Illinois, objected to the administration of the oath to Mr. Whittemore on the ground that he had disqualified himself for being a Member of the House.

It was urged that the credentials should be referred to a committee for examination, and the subject was postponed to a day certain. On June 21 Mr. Logan presented this resolution:

Be it resolved, That the House of Representatives decline to allow said B. F. Whittemore to be sworn as a Representative in the Forty-first Congress and direct that his credentials be returned to him.

Accompanying this resolution was a preamble reciting the facts of the proceedings of expulsion against Mr. Whittemore for the sale of appointments at the Military Academy and the fact that he had escaped expulsion by resigning; and that he had received the censure of the House.

Mr. Logan, in advocating the resolution, said he did not presume that the Constitution contemplated expulsion for any mere political reasons, or for anything except a violation of the rules of the House or an infraction of some existing law. He assumed that where the House had the right to expel for violation of its rules or of some existing law it had the same power to exclude a person from its body. Mr. Logan then had read the law against bribery, for violation of which Mr. Whittemore had been censured. It was right to exclude a man from the House for crime. It was this feature of crime which distinguished this case from those of Messrs. Giddings, of

¹ Discussion of bribery as a disqualification. (See. 946 of Vol. II)

² Alleged statutory disqualifications. (Sec. 955 of Vol. II)

³ Second session Forty-first Congress, Journal, pp. 1040, 1060; Globe, pp. 4588, 4669–4674.

⁴ For those proceedings see Chapter XLII, of this work.

Ohio, and Brooks and Keitt, of South Carolina, who, after receiving the censure of the House, had resigned their seats, and after reelection had been admitted to the House. The case of Mr. Matteson, of New York, who had been censured, was also different, because he had returned to a Congress succeeding that in which he had been censured, and which had no jurisdiction of the offense committed against its predecessor.

Mr. John F. Farnsworth, of Illinois, urged that grave constitutional questions were involved, and that the matter should be referred to a committee for examination. He quoted the Wilkes case to illustrate the dangers of a precedent of exclusion.

The resolution offered by Mr. Logan was adopted by a vote of 130 yeas to 76 nays.

465. The Texas election case of Grafton v. Connor, in the Forty-first Congress.

In 1870 the House declined to exclude John C. Connor, who possessed the constitutional qualifications, and satisfactory credentials, but whose moral character was impeached.

Statement of the attitude of the House at the close of the civil war as to qualifications other than those prescribed by the Constitution.

A military order has been accepted as credentials of Members from a reconstructed State; but the said credentials were examined by a committee before the House authorized the bearers to take the oath.

On March 30, 1870,¹ a message from the President announced that he had approved the act to admit the State of Texas to representation in the Congress of the United States. On the same day a letter was presented "from the secretary of civil affairs, State of Texas, inclosing General Orders, No. 5, headquarters Fifth Military District, Texas, giving the result of an election held on the 30th of November and 1st, 2d, and 3d of December, 1869." This letter, which constituted credentials of election, was referred to the Committee on Elections, the claimants to seats not being sworn in.

On March 31² Mr. Halbert E. Paine, of Wisconsin, from the Committee on Elections, presented the following resolution:

Resolved, That the oath of office be now administered to G. W. Whitmore, J. C. Connor, W. T. Clark, and E. Degener, Representatives-elect from * * * the State of Texas: *Provided*, That the right of any person to contest the seats of either of said Representatives shall not be thereby impaired.

Mr. Joseph P. C. Shanks, of Indiana, proposed an amendment that John C. Connor be not sworn in, but that the contested case of Grafton v. Connor be referred to the Committee on Elections, with instructions to examine and report both as to prima facie and final right.

Thereupon Messrs. Shanks and Benjamin F. Butler, of Massachusetts, presented affidavits wherein it was charged that Mr. Connor, while an officer of the Army, about January 5, 1868, had cruelly whipped and otherwise punished certain negro soldiers of his command, and that later, on October 23, 1869, in a public speech in Texas, he had boasted that he used the lash freely on the soldiers, and

¹ Second session Forty-first Congress, Journal, pp. 547, 548; Globe, p. 2297.

² Journal, pp. 552, 553; Globe, pp. 2322-2329.

had also stated that he escaped conviction by a military court by bribing the soldiers with circus tickets, so that they would not testify against him. Therefore, it was urged that because of bad character he should not be admitted to take the oath, although the Committee on Elections had found his credentials regular and sufficient.

The debate which followed was summarized by a brief colloquy, wherein Mr. James A. Garfield, of Ohio, asked:

Allow me to ask * * * if anything in the Constitution of the United States and the laws thereof * * * forbids that a "moral monster" shall be elected to Congress?

To which Mr. Ebon C. Ingersoll, of Illinois, replied:

I believe the people may elect a moral monster to Congress if they see fit, but I believe that Congress has a right to exclude that moral monster from a seat if they see fit.

The weight of argument was against the position assumed by Mr. Ingersoll. Mr. Henry L. Dawes, of Massachusetts, speaking for the Committee on Elections in the preceding Congress, said:

When any Member, upon his responsibility as a Member, made any charge against any claimant to a seat that touched his constitutional qualification the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the Committee on Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a Member, and never did this House decide that we had the right to go one inch beyond that question. As to the question whether a gentleman claiming a seat has heretofore behaved in a manner unbecoming a Member, I think this is the first time it was ever raised on the floor of the House.

The question being taken on the amendment proposed by Mr. Shanks, the yeas and nays were demanded, but were refused. Tellers also were refused. Then the amendment was disagreed to without division.

Then the resolution proposed by the Committee on Elections was agreed to.

Accordingly the Texas Members-elect, Mr. Connor among them, appeared and were sworn.

On July 15¹ the Committee on Elections reported, and the House agreed to a resolution declaring Mr. Grafton, the contestant, not entitled to the seat.

466. A Member being charged with a crime entirely disconnected from his representative capacity, the House declined to hold that a question of privilege was involved.—On January 7, 1879,² Mr. J. H. Acklen, of Louisiana, after a personal explanation, offered the following:

Whereas J. H. Acklen, a Member of this House, has been charged by affidavit with having seduced Mattie Palfrey Wright, now deceased, in April, 1877, said affidavit having been drawn up by one H. L. Smith, also deceased, and sworn to by said Mattie Wright: Therefore,

Be it resolved, That the Speaker of the House be, and he is hereby, authorized to appoint a committee of three Members of this House, whose duty it shall be to investigate the truth or falsity of said charges, etc.

Mr. John H. Reagan, of Texas, raised the question of order that a mere charge of crime, on which no conviction had been obtained, did not justify the House in taking jurisdiction on the question of qualifications.

¹Journal, p. 1277.

²Third session Forty-fifth Congress, Journal, p. 138; Record, p. 354.

The Speaker ¹ said:

The gentleman from Louisiana rose to a question of personal privilege. The Chair has been reluctant to interrupt him and is reluctant now to decide in a matter affecting the character of a Member of this House. The gentleman from Texas raises the question that this does not embrace a question of personal privilege. Since this discussion has been going on, the Chair, so far as his memory enables him to recollect, fails to remember a single instance during his own term of service in this House wherein charges of this character, which do not directly affect the representative character of a Member of this House, have been made a subject of inquiry by the House. The Chair finds in one instance a decision made by one of his predecessors, Mr. Speaker Linn Boyd, which he desires to have read to the House:

“Mr. Thomas H. Bayly submitted, as a question of privilege, the following resolution, namely:

“*Resolved*, That the special committee of which Hon. Mr. Letcher is chairman be instructed to communicate to this House any communication made to that committee reflecting upon the representative character of T. H. Bayly, a member of this House, by B. E. Green or others, with a view that the House may take such action as to it may seem proper, the said committee having decided that it was not within their jurisdiction.”

The decision in that case by Mr. Speaker Boyd was that it was not a subject of investigation unless it did actually affect the official character of the Representative. In a case like this the Chair is quite willing to submit the question to the House with this preliminary statement on his part.

Thereupon Mr. James A. Garfield, of Ohio, said:

If by “personal privilege” is meant the ordinary rights which the House grants to a man to make a personal explanation, I certainly should vote aye. And therefore I want it understood that my vote, which in this case will be “no,” means that I do not conceive that this is a case about which the House has any jurisdiction to investigate, and in that sense I vote against it.

The Speaker said:

The Chair desires to say in answer to the gentleman from Ohio that the distinction he has drawn is a very proper one. The Chair himself has allowed the personal explanation to be made. The question whether it embraces a privilege affecting the character of a Member of the House the Chair prefers to submit to the House.

The Speaker having put the question: “Does the said preamble and resolution involve a question of privilege?” it was decided in the negative without division.

On April 15, 1879,² Mr. J. R. Chalmers, of Mississippi, claiming the floor for a question of personal privilege, had read a newspaper article describing him as “one of the notorious and bloody-handed butchers of the forever infamous Fort Pillow massacre,” etc. Then Mr. Chalmers offered a resolution providing for a select committee to investigate the subject of General Chalmer’s conduct.

Mr. James A. Garfield, of Ohio, made a point of order.

The Speaker did not rule upon the question, which was after debate postponed.

On May 7,³ after further debate, the House laid the resolution on the table—ayes 98, noes 70.

467. The Utah election case of McGrorty v. Hooper, in the Fortieth Congress.

In 1868 the House declined to pass on the title to a seat of William H. Hooper, Delegate from Utah, who was alleged to have been elected by undue influence of an alleged disloyal organization.

¹ Samuel J. Randall, of Pennsylvania, Speaker.

² First session Forty-sixth Congress, Record, p. 455.

³ Record, pp. 1125–1132.

In 1868 the House refused a seat to a contestant who received a small minority of the votes in a Territory, but who alleged that the majority voters were disqualified by treasonable antagonism to the Government.

An instance wherein a Delegate gave notice of a contest by a telegram, which was submitted to the House by the Speaker.

In 1868 the House entertained a contest for the seat of a Delegate, although the first notice of contest was irregular and the supplemental notice was not filed within the time required by law.

A resolution declaring a Delegate entitled to his seat being laid on the table, the Delegate continued to exercise his functions.

On March 5, 1867,¹ the Speaker laid before the House a telegram from William McGrorty, giving notice of contest for the seat of William H. Hooper, Delegate from Utah Territory. On March 6 Mr. Hooper was sworn in without any question being raised.

On July 9, 1868,² Mr. John W. Chanler, of New York, submitted the report of the committee.³ The consideration of the case involved a preliminary question as to the notice of contest. Contestant admitted that he had not proceeded according to the terms of the law, explaining his reasons:

On the 23d of February, 1867, the contestant deposited in the office of Wells, Fargo & Co., at Great Salt Lake City, a notice directed to the Hon. William H. Hooper, and a similar notice to the Clerk of the House of Representatives, notifying them that he should contest the seat of said Hooper, which notices were received in this city and delivered to the parties to whom they were addressed some time in the month of March following.

The reasons why the grounds were not stated in the notice are fully set forth in the affidavit of contestant, made on the 18th of January, 1868, which has been placed before the committee, with the other papers in the case; and it is confidently submitted that those reasons are sufficient to excuse him from a literal compliance with the law. It is there shown that it would have been impossible to contest the election in the usual manner because of the hostility of the Mormon leaders, endangering the lives of himself and friends, and the destruction of the ballots and lists of voters, at the time when the notice was sent to Mr. Hooper.

The sitting Delegate objected that the notice had not been filed within the time required by law, that it did not comply with the law, although there existed no valid reasons why it should not have done so, and that the testimony taken was *ex parte*.

Contestant urged⁴ that, while his original notice was defective in specifications, his second amended notice of January 18, 1868, supplied all omissions, and considered that the precedents of the House (citing *Kline v. Verree*) justified its reception. He also urged through his counsel that the law of 1851 concerning contested elections did not apply to the Territories, citing cases of *Hunt v. Palao* and *Benner v.*

¹First session Fortieth Congress, Journal, pp. 11, 13; Globe, p. 11; 2 Bartlett, p. 211; Rowell's Digest, p. 216.

²House Report No. 79, second session Fortieth Congress.

³It was stated in debate that four members of the committee—Messrs. Henry L. Dawes, of Massachusetts; Charles Upson, of Michigan; Joseph W. McClurg, of Missouri, and Glenni W. Scofield, of Pennsylvania—dissented from the views in the report, although agreeing to the resolutions. (Globe, p. 4383.)

⁴Speech of contestant, Globe, pp. 4384, 4385.

Porter, as well as others. Furthermore, it was urged that the law of 1851 was not absolutely binding on the House, being only a wholesome rule which might be departed from for good cause, citing *Williams v. Sickles*.

The committee in their report did not specifically discuss this preliminary question; but the fact that they proceed to consider the case on its merits is an evident decision.

As to the merits of the case, the contestant presented seven grounds of contest, but the report discusses only three:

1. That the sitting Delegate represents a community separated from and hostile to the other portions of the people of the United States, and organized and acting in disregard and violation of the laws of the United States, and under an anti-republican form of government.
2. That he [the sitting Delegate] is the representative of the institution of polygamy.
3. That his secret oath, taken in the Mormon Church, disqualifies him from sitting as a Delegate in the Congress of the United States.

The contestant, as appears from his address to the House, argued that since the constituency was hostile to the Government of the United States those who voted for the sitting Delegate were incompetent electors and their votes were void. He also urged that there were illegalities connected with the election which rendered it impossible to determine what votes were cast according to law. Contestant also argued that as the sitting Delegate had taken oaths pledging him to hostility to the United States he was disqualified for the office and all votes cast for him were void. This disqualification he attempted to prove by affidavits, *ex parte* in nature, describing the oaths taken by Mormons in the "endowment" ceremonies. Contestant further argued that, although the majority of the people of the Territory were disloyal and incompetent, the loyal minority should not be deprived of its representation.

The official returns had given 15,068 votes for sitting Delegate and 105 for contestant. Therefore contestant claimed the seat as representative of the loyal minority of 105.

The committee discussed at length the people and institutions of Utah, summarizing their conclusions:

So far, therefore, as it was to the interest of the leaders of Mormonism to oppose this Government, to strengthen and enrich themselves and secure the support of new converts, your committee think the organization has been antagonistic to the United States. But from no malice aforethought have they ever, as far as any proof has come to your committee, organized rebellion or sedition against the supreme authority of this Union, or committed treason by any overt act.

To remedy the evils which now exist in this Territory and to prevent them in the future has been a matter of serious consideration for many years by this Government, and a plan is now before the Committee on Territories in the Senate for radically changing the manner of carrying on the government of Utah.

The duties of your committee do not extend to the subject-matter of reform in the Territory further than to protect the purity of the representative system and secure to every citizen of the United States the full enjoyment of his liberty at the polls.

Your committee believe that it is the imperative duty of Congress to enforce the laws by every means in the power of this Government, to prevent undue influence of the hierarchy of the Mormon society over the people of that Territory.

A strong belief exists in the mind of your committee that to considerable extent such influence has been used in the recent elections for Delegate to Congress from Utah, but sufficient proof of its illegality

has not come to their knowledge to warrant, in their opinion, any direct interference by immediate action of Congress.

The vote polled, under whatever control it may have been deposited, is, in the opinion of your committee, in default of full and satisfactory evidence to the contrary, to be deemed and accepted as the legal vote of the people of Utah. Their minds may have been under religious or other prejudice, created or increased by the Mormon leaders in favor of one candidate and against the other, but there is no reason to conclude that the free exercise of the ballot by the citizen was unlawfully prevented by force or fraud. No sufficient proof to that effect has, in the opinion of your committee, been presented by the contestant. The committee therefore unanimously agree to present the following resolutions, to wit:

“Resolved, That William McGrorty is not entitled to a seat in this House as a Delegate from the Territory of Utah.

“Resolved, That William H. Hooper is entitled to a seat in this House as a Delegate from the Territory Of Utah.”

The report was debated on July 23, 1868,¹ the principal argument being made by contestant, and the first resolution, declaring contestant not entitled to the seat, was agreed to without division. The second resolution, declaring sitting Member entitled to the seat, was laid on the table.

The practical effect of this action was to leave sitting Delegate in the seat, as is shown by his appearance at the next session of this Congress.²

468. The Utah election case of Maxwell v. Cannon, in the Forty-third Congress.

In 1873 the House seated Delegate George Q. Cannon on the strength of his unimpeached credentials, although it was objected that he was disqualified.

On December 2, 1873,³ the Delegates from the Territories were called to be sworn after the House had been fully organized. To Delegate George Q. Cannon, of Utah, objection was made by Mr. Clinton L. Merriam, of New York, who presented for the action of the House the following resolution:

Whereas it is alleged that George Q. Cannon, of Utah, has taken oaths inconsistent with citizenship of the United States and with his obligations as Delegate in this House, and has been, and continues to be, guilty of practices in violation and defiance of the laws of the United States: Therefore,

Resolved, That the credentials of said Cannon, and his right to a seat in this House as a Delegate from Utah, be referred to the Committee on Elections, and that said Cannon be not admitted to a seat in this House previous to the report of said committee.

In the course of the debate Mr. Stephen W. Kellogg, of Connecticut, asked if there was any other certificate or credential from the governor of Utah than the one which had already been presented in behalf of Mr. Cannon.

The Speaker replied that the Clerk informed him that that was the only credential that had been presented from Utah.

In the course of the debate the Maryland case in the Forty-first Congress was cited in support of the contention that he was entitled by *prima facie* right to his seat on the certificate. It was argued (by Mr. Benjamin F. Butler, of Massachusetts) that to take any other course would be to establish precedents that in

¹ Second session Fortieth Congress, Journal, p. 1159; Globe, pp. 4383–4389.

² Third session, Journal, p. 181.

³ Cong. Record, first session Forty-third Congress, pp. 7 and 8.

times of high party excitement might prevent the organization of the House indefinitely.

Mr. Merriam's resolution was laid on the table without division, and Mr. Cannon then took the oath.

469. The Utah case of Maxwell v. Cannon continued.

In 1873 the Elections Committee concluded that a Delegate who had been sworn could be reached on a question of qualifications only by process of expulsion.

The Elections Committee concluded in 1873 that if the Member-elect be disqualified the minority candidate is not thereby entitled to the seat.

Discussion of the right of the House to fix qualifications other than those specified by the Constitution.

Discussion of the distinction between the power to judge of the elections, returns, and qualifications of the Member and the power to expel.

In 1873 the Elections Committee concluded that where a law of Congress extended the Constitution over a Territory, the qualifications of the Delegate should be similar to those of Members.

Discussion as to whether or not the expulsion of a Delegate should be effected by a majority or a two-thirds vote.

On April 30, 1874,¹ Mr. Gerry W. Hazelton, of Wisconsin, submitted the report of the majority of the committee in the Utah case of Maxwell v. Cannon, which had come before the Committee on Elections like ordinary cases of that kind. It was not claimed by the contestant that he had received a majority of the votes actually cast, although it was maintained that gross irregularities existed in the manner of conducting the election and making the returns. While there was testimony to bear this out, yet the sitting Member undoubtedly had a majority of the legal votes.

Therefore two questions were left for the committee:

(1) Contestant raised the following question:

George Q. Cannon, the sitting Delegate, is not qualified to represent said Territory, or to hold his seat in the Fortythird Congress, and for cause of disqualification we say it is shown by the evidence that he, at and before the day of the election, to wit, on the 5th day of August, 1872, was openly living and cohabiting with four women as his wives in Salt Lake City, in Utah Territory, and he is still so living and cohabiting with them.

The sitting Delegate in his answer had denied the charges of contestant on the subject of polygamous relations.

The committee first proceeded to consider the question of their own jurisdiction to consider a question of qualifications. They say:

What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen.

The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified mentioned in the notice of contest and hereinbefore alluded to.

¹ Report No. 484; Smith, p. 182; Rowell's Digest, p. 291.

It being conceded that the contestee has these qualifications, one other inquiry only under this head remains, to wit: Does the same rule apply in considering the case of a Delegate as of a Member of the House? This question seems not to have been raised heretofore.

The act organizing the Territory of Utah, approved September 9, 1850, enacts that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable.

It was said on the argument that the Constitution cannot be extended over the Territories by act of Congress, and the views of Mr. Webster were quoted in support of this position.

We do not deem it necessary to consider that question, because it will not be denied that Congress had the power to make the Constitution a part of the statutory law of the Territory as much as any portion of the organic act thereof. For the purposes of this inquiry, it makes no difference whether the Constitution is to be treated as constitutional or statutory law. If either, it is entitled to be considered in disposing of this case.

Now, while it would be entirely competent for Congress to prescribe qualifications for a Delegate in Congress entirely unlike those prescribed in the Constitution for Members, it seems to us, in the absence of any such legislation, we may fairly and justly assume that by making the Constitution a part of the law of the Territory, Congress intended to indicate that the qualifications of the Delegate to be elected should be similar to those of a Member. It would seem to be to that extent an instruction to the electors of the Territory, growing out of the analogies of the case.

We conclude, therefore, that the question submitted to us, under the order of the House, comes within the same principles of jurisdiction as if the contestee were a Member instead of a Delegate.

This position, it will be observed, does not conflict with the right of the House to refer a preliminary inquiry to this committee as to the disqualification of a Member or Delegate to be sworn in and take his seat prior to the oath being administered. In such case the reference is special, and the jurisdiction of the committee follows the order of the House.

The case of Samuel E. Smith against John Young Brown, in the Fortieth Congress, is in point. That case was referred to the Committee on Elections, before the contestee was sworn in, to ascertain and report whether he had committed any of the acts specified in the law of July 2, 1862, which he was required to swear he had not committed, before entering on the duties of a Representative.

It was a preliminary inquiry, made under a special order of the House, and might have been executed as properly by the Judiciary Committee or by special committee. It did not relate in the remotest manner to the election, returns, and qualifications of the claimant under the Constitution.

The contestee in this case having been sworn in and admitted to his seat, and his name officially entered upon the roll of Delegates, we think he can be reached only under the exercise of the power of expulsion, which it is competent for the House to set in motion by a special order of reference.

(2) The second question related to the claim of the contestant to a seat as the minority candidate, the majority candidate being disqualified. The committee deny the authority of the case of Wallace v. Simpson in support of this contention, and quote the case of Smith v. Brown as establishing a doctrine contrary to that laid down by the contestant.

Therefore the majority of the committee recommended the adoption of the following resolutions:

Resolved (1), That George R. Maxwell was not elected, and is not entitled to a seat in the House of Representatives of the Forty-third Congress as Delegate for the Territory of Utah.

Resolved (2), That George Q. Cannon was elected and returned as a Delegate for the Territory of Utah to a seat in the Forty-third Congress.

Mr. Horace H. Harrison, of Tennessee, dissented from the conclusions of his associates wherein they stopped short in their second resolution of declaring Mr. Cannon entitled to the seat, and proposed the following:

Resolved, That George Q. Cannon was duly elected and returned as Delegate from the Territory of Utah, and is entitled to a seat as a Delegate in the Forty-third Congress.

Mr. Harrison considered that a Delegate should not be considered as on any different basis from a Member, and proceeded to make his argument with this proposition understood. Mr. Harrison says:

The qualifications of Representatives in Congress are prescribed by the second section of the first article of the Constitution of the United States.

They are: First, that they shall have attained the age of 25 years; second, that they shall have been seven years citizens of the United States; and, third, that they shall when elected be inhabitants of those States in which they shall be chosen. No other qualifications are prescribed in the Constitution.

If the Constitution of the United States had vested anywhere the power to prescribe qualifications of Representatives in Congress additional to or different from those prescribed by the Constitution itself, it is obvious that this power would have been conferred either upon Congress, or upon the House alone, or upon the States.

In the history of our Government it has never been claimed that the House of Representatives, acting alone, possessed the power to add to or change the qualifications of its Members. The vain attempt made by Mr. Randolph, in the case of *Barney v. McCreery*, in the Tenth Congress, to vindicate a claim of that kind in favor of the States, signally failed, and has never been repeated in the House.

Mr. Justice Story, in his discussion of the subject of the qualifications of Representatives in Congress, says that it would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office it meant to exclude all others, as prerequisites, and that from the very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others. And although it is certain that the letter of those constitutional provisions which relate to Representatives from the States does not apply exactly to the cases of Delegates from the Territories, still it is just as certain that their spirit does.

Mr. Harrison declared that no act could be found fixing the qualifications of a Delegate or providing a disqualification for any cause. The act of July 1, 1862, provided a punishment for bigamy; but disqualification for office was not a part of this punishment.

Mr. Harrison then continued:

The precedents of the House are in accordance with this construction of the Constitution. There has been no precedent since the organization of the Government which would justify, any more than would the Constitution itself justify, the House acting as the judges of the election, returns, and qualifications of Mr. Cannon, in a decision to deprive him of his seat on the ground that he has violated the law prohibiting polygamy in the Territories of the United States.

The case of *B. F. Whittemore*, in the Forty-first Congress, is relied upon as an authority for the refusal to admit a Representative-elect on other grounds than mere constitutional disqualifications. But a critical examination of that case will show that the House only decided that a Representative who had by resignation escaped expulsion for an infamous crime from that House should not be readmitted to the same House.

The case of *Mr. Matteson*, in the Thirty-fifth Congress, relied upon in argument before the committee, was a cue arising, not under the clause of the Constitution which makes each House the judge of the election, returns, and qualifications of its Members, but under that clause which confers the power of expulsion.

The line of demarkation between these two great powers of the House, the power to judge of the election, returns, and qualifications of its Members by a mere majority vote, and the power to expel its Members by a two-thirds vote, is clear and well defined. That line is not to be obliterated. It would be necessary to preserve it, even though its obliteration might seem to threaten no disasters, even though its maintenance might promise no benefits to the House, to the people, or to the Constitution. For this barrier is raised by the Constitution itself.

The framers of the Constitution of the United States, in prescribing or fixing the qualifications of Members of Congress, must be presumed to have been dealing with the question with reference to an

obvious necessity for uniformity in the matter of the qualifications of Members, and with a jealous desire to prevent, by the action of either House of Congress, the establishment of other or different qualifications of Members.

It was appropriate and proper-in fact, necessary-that the power should be given to each House to judge of the elections, returns, and qualifications of its Members; that is, to judge of the constitutional qualifications of its Members.

The exercise of this power requires only a majority vote.

But the House possesses another power, to decide who shall and who shall not hold seats in that body. It is altogether distinct, in origin and character, from that to which I have just referred. It is the power of expulsion, which requires a two-thirds vote for its exercise. It is conferred by the following clause of the Constitution:

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

This power of expulsion conferred by the Constitution on each House of Congress was necessary to enable each House to secure an efficient exercise of its powers and its honor and dignity as a branch of the National legislature.

It was too dangerous a power to confer on either House without restriction, and hence it was expressly provided in the Constitution that there must be a concurrence of two-thirds of the Members to expel.

Under this power, guarded as it has been by the constitutional provision requiring a vote of two-thirds, there have been but a very few instances of expulsion since the organization of the Government, and it would seem that a power so rarely exercised does not require the agency of a standing committee.

The minority views then go on to discuss the cases of Benjamin G. Harris, of Maryland, and of Mr. Herbert, of California, and concluded that the House had always declined to fix qualifications outside of those fixed by the Constitution, and that

the failure of the committee in this case, after that committee has found that the sitting Delegate from Utah has been duly elected and returned, to report that he is entitled to his seat, is unauthorized in principle or by precedent and dangerous, in so far as it tends to break down the distinction between the jurisdiction of the House in such a contest as the present one and the jurisdiction of the House by a two-thirds vote to expel a member from the House.

The report was debated at length on May 12.¹ The debate referred to the status of a Delegate, and to the propriety of adding to the qualifications prescribed in the Constitution. In the course of the debate Mr. E. R. Hoar, of Massachusetts, raised the question as to whether or not a two-thirds vote was needed for the expulsion of a Delegate. Delegates were creatures of statutes, and he doubted the power of a preceding Congress to impose on the present Congress, against its will, the presence of any one besides the Members who came by constitutional right.

At the conclusion of the debate the two resolutions recommended by the majority of the committee were agreed to without division.

Then, by a vote of 109 yeas to 76 nays, the resolution contended for by Mr. Harrison was agreed to.

470. The Utah election case of Maxwell v. Cannon, continued.

In 1873 it was proposed by the majority of the Elections Committee to exclude Delegate George Q. Cannon for polygamy; but the resolution was not considered.

¹ Journal, pp. 959-962; Record, pp. 3813-3819.

Then, by a vote of 137 yeas to 51 nays, the House agreed to the following resolution proposed by Mr. Hazelton, in connection with the report of the Committee on Elections:

Whereas George R. Maxwell has prosecuted a contest against the sitting Member, George Q. Cannon, now occupying a seat in the Forty-third Congress as Delegate for the Territory of Utah, charging, among other things, that the said Cannon is disqualified from holding, and is unworthy of, a seat on the floor of this House, for the reason that he was at the date of his election, to wit, on the 5th day of August, 1872, and prior thereto had been, and still is, openly living and cohabiting with four women as his wives under the pretended sanction of a system of polygamy, which system he notoriously endorses and upholds, against the statute of the United States approved July 1, 1862, which declares the same to be a felony, to the great scandal and disgrace of the people and the Government of the United States, and in abuse of the privilege of representation accorded to said Territory of Utah, and that he has taken and never renounced an oath which is inconsistent with his duties and allegiance to the said Government of the United States; and whereas the evidence in support of such charge has been brought to the official notice of the Committee on Elections: Therefore,

Resolved, That the Committee on Elections be, and is hereby, instructed and authorized to investigate said charge and report the result to the House and recommend such action on the part of the House as shall seem meet and proper in the premises.

On January 21, 1875,¹ Mr. H. Boardman Smith, of New York, submitted the report of the majority of the committee in response to these instructions. The committee give an account of the evidence before them, state that the testimony as to the oath in the Endowment House is conflicting, and say, first quoting the statute:

"That every person having a husband or wife living who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless*, That this section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living, nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court, nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract."

The second section disapproves and annuls all acts and ordinances of the provisional government of Deseret and of the Territory of Utah which establish, support, maintain, shield, or countenance polygamy, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecration, or other contrivances.

This statute was approved on the 1st day of July, 1862, and has since remained the law of the land.

It is proper to add that, after the adoption of the resolution above quoted referring this question to your committee, an act was passed by this House, at the last session, with little or no opposition, which reads as follows:

"[H.R.3679. Forty-third Congress, first session.]

"IN THE SENATE OF THE UNITED STATES, JUNE 17, 1874.—READ TWICE AND REFERRED TO THE COMMITTEE ON TERRITORIES.

"AN ACT defining the qualifications of Territorial Delegates in the House of Representatives.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, No person hereafter shall be a Delegate in the House of Representatives from any of the Territories of the United States who shall not have attained the age of twenty-five years, and been

¹House Report No. 106, second session Forty-third Congress; Smith, p. 259.

seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the Territory in which he shall be chosen; and no such person who is guilty either of bigamy or of polygamy shall be eligible to a seat as such Delegate.

"Passed the House of Representatives June 16, 1874.

"Attest:

EDWARD MCPHERSON, *Clerk.*"

Notwithstanding this fact the said Delegate was a candidate at the recent election, and was actually elected Delegate for the same Territory in the Forty-fourth Congress.

Your committee think the evidence, unchallenged as it is by the Delegate, establishes that, at the date of his election, to wit, on the 5th day of August, 1872, and prior thereto, the said Delegate was, and still is, openly living and cohabiting with four women as his wives, under the pretended sanction of a system of polygamy, which system he notoriously indorses and upholds, in violation of the statute of the United States, approved July 1, 1862, above quoted.

Therefore the majority recommended that the following resolution be agreed to by the House:

Resolved, That George Q. Cannon, Delegate from Utah, being found, upon due consideration of the evidence submitted, and not controverted by said Cannon, to be an actual polygamist, and to have married his fourth wife, having three other wives then living, in the month of August, 1865, in open and notorious violation of the law of July 1, 1862, forbidding such marriage, and declaring the same to be a crime punishable both by fine and imprisonment, and it appearing that he still maintains his polygamous practices in defiance of law, is deemed unworthy to occupy a seat in the House of Representatives as such Delegate, and that he be excluded therefrom.

The minority of the committee, Messrs. Horace H. Harrison, of Tennessee, C. R. Thomas, of North Carolina, L. Q. C. Lamar, of Mississippi, Edward Crossland, of Kentucky, and R. M. Speer, of Kentucky, opposed this proposed action, but Mr. Harrison alone gave his grounds for his opposition, making an elaborate minority report.

This is the first instance [says this report] where it has been sought to expel a Delegate from one of the Territories of the United States, and there is little in the shape of authority to guide us in the examination of the question.

Although there is nothing in the Constitution concerning a Delegate from the Territories of the United States, and no express provision therein for their expulsion as there is in the case of Members, we do not doubt the power of the House to expel. The power results simply from the fact that the Delegate is, in some sense, a Member, or is one of the body. He is entitled, as well by courtesy as by a custom which has obtained in this country upon the organization of Territorial government in the Territories, to certain rights and privileges; he is entitled to introduce and advocate on the floor of the House any measure affecting the people of the Territory, or to oppose in debate any measure he may deem injurious to them. He is amenable to the rules of the House or the regulations concerning its proceedings. He would clearly, as it is assumed, have to possess certain qualifications to entitle him to be a Delegate—at least that of citizenship, as is shown in the contest in regard to the admission of the Delegate from Michigan Territory in 1823, during the Eighteenth Congress.¹

Everything in relation to the position of a Delegate having the rights and privileges we have mentioned, and every relation he bears to the House or to the Members thereof, in the absence of anything in the Constitution and laws on the subject, would suggest that if a Delegate is expelled it ought to be for the same causes that would justify the House in expelling a Member, and that the power to expel should be exercised as the constitutional power to expel a Member is exercised.

It would seem that all of the reasons that can be urged in favor of the rule which the framers of the Constitution made concerning the expulsion of a Member apply with equal force in the case of a Delegate. The framers of that instrument regarded this power to expel a Member by a mere majority

¹See section 421 of this work.

vote as a dangerous one, and guarded its exercise by providing, in substance, that an expulsion of a Member could only be ordered by a two-thirds vote. Of course, we will not be understood as contending that the House has not the power, if it choose to exercise it, to expel a Delegate by a mere majority vote, or that there is any express provision of law operating as an inhibition on this power. But we submit that this power should be regulated in its exercise by a legal discretion, and that no safer rule can be found than the one which is deduced from the analogy we have mentioned.

If it is true that the power to expel a Delegate is drawn from analogy to the power given in the matter of the expulsion of members, it would seem to follow that, looking to this fact and to the nature of the office of a Territorial Delegate as a representative of a portion of the people of this country, and as, in some sense, a Member of this body, he ought not to be expelled except for causes which would justify the House in expelling a Member, and by a two-thirds vote on the question.

He certainly ought not to be expelled for political reasons or causes, or on account of the existence of certain practices in the Territory he represents, or to punish him for an alleged indulgence therein or the people he represents by depriving them of representation.

After discussing the subject of Mormonism in the Territory of Utah, and the fact that the Territory had frequently been represented by Delegates who practiced polygamy, the report continues:

But a graver question than those we have considered is the question whether the House ought, as a matter of policy, or to establish a precedent, expel either a Delegate or Member on account of alleged crimes or immoral practices unconnected with their duties or obligations as Members or Delegates, when the Delegate or Member possesses all the qualifications to entitle him to his seat.

If we are to go into the question of the moral fitness of a Member to occupy a seat in the House, where will the inquiry stop? What standard shall we fix in determining what is and what is not sufficient cause for expulsion?

The report discusses the possibilities of such moral and political disqualifications being made a pretext for depriving constituencies of their representation. To illustrate the reluctance of the House to expel for such reasons, two cases were cited: That of Benjamin G. Harris, of Maryland, who had been convicted of aiding the rebellion, but who was allowed to hold a seat in the Thirty-ninth Congress;¹ and Representative Herbert, of California, who was charged with homicide, but who was not disturbed in his seat.²

The committee also laid stress upon the fact that at the previous session the House had declared Mr. Cannon entitled to his seat.

On February 9, 1875, Mr. Smith, of New York, called up the resolution reported by the majority of the committee. The consideration of it was antagonized on behalf of an appropriation bill, and the House voted by a large majority not to consider.³

471. The Utah election case of Campbell v. Cannon, in the Forty-seventh Congress.

In 1882 the House declined to permit the oath to be administered to either of two contesting Delegates until the papers in relation to the prima facie right had been examined by a committee.

The House has given to a committee the right to decide on either the prima facie or final right to a seat before authorizing the oath to be administered to a Delegate.

¹ On December 19, 1865, the resolution relating to Mr. Harris was introduced.

² On February 24, 1857, this case was reported on, no action being recommended.

³ Second session Forty-third Congress, Record, p. 1083.

On January 10, 1882,¹ the House proceeded to the consideration of this resolution, offered December 6, 1881:

Resolved, That Allen G. Campbell, Delegate elect from Utah Territory, is entitled to be sworn in as Delegate to this House on his prima facie case.

To this Mr. Thomas B. Reed, of Maine, offered the following as a substitute:

Resolved, That the papers in relation to the right to a seat as a Delegate from the Territory of Utah be referred to the Committee on Elections,² with instructions to report at as early a day as practicable as to the prima facie right, or the final right, of claimants to the seat as the committee shall deem proper.

After debate the substitute was agreed to, and the resolution as amended was agreed to.

The facts of the case appeared as follows: That Mr. Campbell had the governor's certificate of election; that Mr. George Q. Cannon received 18,568 votes, and Mr. Campbell only 1,357; that Mr. Cannon was a naturalized citizen, and also a Mormon and a polygamist, living with plural wives, and a defender of the institution of polygamy.³

472. The Utah election case of Campbell v. Cannon, continued.

A committee having power to report on either prima facie or final right, made a single report on final right only.

Records of returns, duly authenticated by seal, are received as evidence in election cases after the time for taking testimony is closed.

The record of a court of naturalization sufficiently establishes citizenship, even though it be alleged that the certificate of the fact has not been issued regularly.

The court record of naturalization may not be questioned collaterally by evidence impeaching the facts on which the certificate was issued.

On February 28, 1882,⁴ the report of the majority of the Committee of Elections in the Utah case of Campbell v. Cannon was submitted to the House. The following is a statement⁵ of the essential preliminary facts:

The election out of which it arises was held on November 2, 1880, for the choice of a Delegate from the Territory of Utah. The returns, which were duly filed with the secretary of the Territory, were opened and canvassed by him in the presence of the governor of the Territory on December 14, 1880. The canvass of the votes, which was concluded on January 8, 1881, showed that George Q. Cannon received 18,568 votes, and Allen G. Campbell received 1,357 votes. The law provides that the person having the highest number of votes shall be declared by the governor to be elected. The governor,

¹ First session Forty-seventh Congress, Journal, pp. 255, 256; Record, pp. 322-340.

² The Committee on Elections consisted of Messrs. William H. Calkins, of Indiana, George C. Hazelton, of Wisconsin, John T. Wait, of Connecticut, William G. Thompson, of Iowa, Ambrose A. Ranney, of Massachusetts, James M. Ritchie, of Ohio, Augustus H. Pettibone, of Tennessee, Samuel H. Miller, of Pennsylvania, Ferris Jacobs, jr., of New York, John Paul, of Virginia, Frank E. Beltzhoover, of Pennsylvania, Gibson Atherton, of Ohio, Lowndes H. Davis, of Missouri, G.W. Jones, of Texas, and Samuel W. Moulton of Illinois.

³ Although Mr. Campbell had the certificate of the governor, the Clerk of the preceding House had placed Mr. Cannon's name on the roll at the opening of the Forty-seventh Congress. The Speaker, however, declined to recognize the roll of delegates, and Mr. Cannon was not sworn in.

⁴ House Report No. 559, first session Forty-seventh Congress; 2 Ellsworth, p. 604.

⁵ This statement is from the views of Mr. F.E. Beltzhoover, of Pennsylvania, who concurred generally with the conclusions of the majority of the committee.

however, in the mistaken belief that he had the right to go behind the returns, heard evidence and arguments to show that Mr. Cannon was an alien and polygamist, and on these grounds finding them, as he believed, sustained, declared Mr. Cannon ineligible and disqualified to serve as a Delegate. The governor further decided, under an erroneous view of the law, that Mr. Cannon being ineligible, the votes cast for him were void, and Mr. Campbell being a citizen and eligible, and having received the next highest number of votes, was elected. The governor accordingly gave Mr. Campbell a certificate of election, and filed among the records of the Territory, in the office of the secretary thereof, an elaborate opinion containing a full statement of the facts. The secretary of the Territory, on January 10, 1881, gave Mr. Cannon a certified copy of the opinion and declaration of the governor, and also, on January 20, 1881, gave him a certified abstract of all the returns.

Mr. Cannon notified Mr. Campbell, on February 4, 1881, that he would contest his seat on the ground that he (Cannon) had received a large majority of the votes cast. On February 24, 1881, Mr. Campbell replied to Mr. Cannon's notice that he was not elected, and, if elected, was disqualified by reason of his alienage and polygamy. No testimony was taken by Mr. Cannon in support of his notice during the time allowed to him by law, but on May 9, 1881, and subsequently thereto, testimony was taken by Mr. Campbell to show that Mr. Cannon was a polygamist and an unnaturalized alien, and by Mr. Cannon, in reply, to show his citizenship.

The certificates held by Mr. Cannon and Mr. Campbell and all the papers and testimony in the case were placed in the custody of the Clerk of the Forty-sixth Congress, and by him were handed over to his successor at the organization of the Forty-seventh Congress.

When the Forty-seventh Congress was organized and the Delegates from the Territories were called to be sworn, objection was made to both Mr. Campbell and Mr. Cannon, and neither was admitted. After a full discussion of the question as to which of the two gentlemen had the *prima facie* right to the seat, it was resolved by the House, on January 13, 1882—

“That the papers in relation to the right to a seat, as a Delegate from the Territory of Utah, be referred to the Committee on Elections, with instructions to report, at as early a day as practicable, as to the *prima facie* right or the final right of the claimants to the seat, as the committee shall deem proper.”

While the majority of the committee concurred in a conclusion, they quite generally filed individual views instead of joining in a report. But the views filed by Mr. William H. Calkins, of Indiana, chairman of the committee, who submitted the report to the House, were generally referred to in the debate as representing most nearly the position of the majority.

As to the question of *prima facie* right, Mr. Calkins took this view, seeming, in doing so, to voice the general opinion of the committee:

At the threshold of this case we were met with a certificate held by Mr. Campbell, the contestee, from the governor of Utah Territory. We decline to enter into a discussion of the *prima facie* right of Mr. Campbell to take his seat as a Delegate on this certificate, because we construe the action of the House on passing on it as a decision adverse to Mr. Campbell, and, being compelled to report on the whole case, we deem it a piece of supererogation to reopen the case of the *prima facie* right, being satisfied with the action of the House thereon. We dismiss that part of the case from further consideration.

At the outset Mr. Calkins thus discussed a question of practice:

The next question that meets us is a question of practice raised by the contestee; which is, that there is no competent evidence before the committee relative to the number of votes cast for Mr. Cannon at the last election, and it is therefore contended that, on the certificate issued by the governor to Mr. Campbell, he is entitled *pro confesso* to the seat on the final hearing.

The facts before us are as follows: A certified transcript made by the secretary of the Territory, under the seal thereof, was filed by Mr. Cannon with the Clerk of the House of Representatives on the — day of November, 1880, and was duly referred to this committee under a resolution of the House adopted on the — day of December, 1881. It did not reach the committee at the same time that the other papers in the contest came into its possession, but shortly thereafter it was sent by the Clerk of

the House to this committee. These certificates purport on their face to be certified transcripts of the returns made by the county canvassing boards to the secretary of the Territory, under the laws of Utah.

We therefore hold that certificates of election made by county canvassing boards to the secretary of the Territory (under the Territorial law relative to the election of other Territorial officers of the Territory—see secs. 22, 23, and 38, et seq.) constitute the proper mode to be pursued in the Territories in respect to the election of Delegates, and that that mode gives effect to the law which makes it the duty of the governor to canvass the votes and to give a certificate to the person receiving the highest number of votes for Delegate in Congress. It has been the practice of this committee to receive all records duly authenticated by a seal without having them first introduced before the magistrate who takes and certifies the depositions. We know of no other practice that has obtained since the foundation of the Government. This class of evidence has never been held to fall within the meaning of the law passed by Congress relative to contested-election cases. The testimony there referred to is the testimony of witnesses or the introduction of such documents as need identification or further proof before their competency is admitted, and we hold that it does not apply to records and evidence which a seal may make perfect without further identification. If the contestee has been or is surprised at the introduction of this testimony, his proper course is to make application for a continuance, so that he may be allowed to take further testimony. Not having made such application, we presume that he does not wish to avail himself of that course in this case. McCrary seems to hold the better practice to be otherwise (sec. 362), but section 353 so modifies the doctrine first laid down that it is not in conflict with the view the committee take.

This seems to have been the generally accepted view in the committee, although Mr. William G. Thompson, of Iowa, in his views, antagonizes it:

The contestee had a right to the notice required by law; he had a right to be present and cross-examine the witness; he had a right to show that this statement was not the best evidence and demand that investigation be made into the legality of every ballot cast, as well as the qualifications of each elector, and especially so when we find in evidence this strange law upon the statute books of Utah, then and now in force (act of Feb. 12, 1870, sec. 43, ch. 2): "That every woman of the age of twenty-one years who has resided in the Territory six months next preceding any general election, born or naturalized in the United States, or who is a wife or daughter of a native-born or naturalized citizen of the United States, shall be entitled to vote at any election in this Territory."

The acceptance of these returns as evidence disposed necessarily of the question as to whether or not Mr. Cannon received the highest number of legally cast votes for the office of Delegate to Congress.

The next question in issue was:

Was he a citizen of the United States at the time of his election and did he possess the other necessary qualifications?

This question involved the determination of certain facts as to the naturalization of Mr. Cannon. It was alleged that his certificate had not been regularly issued, but the majority considered that the records of the court established it sufficiently. On another point, however, Mr. Calkins said:

The other point made, that Mr. Cannon had not been a resident of any State or Territory of the United States for five years next preceding the date of naturalization, involves quite a novel question. We hold, however, on this point, that the record can not be collaterally questioned, and that therefore it is incompetent to show by evidence in this proceeding that the certificate is null. (*Prait v. Cummings*, 16 Wend., 616; *State v. Penny*, 10 Ark., 616; *McCarthy v. Marsh*, 1 Seld., 263; *In re Colman*, 15 Blatchf., 406; *Spratt v. Spratt*, 4 Pet., 393.)

473. The Utah election case of *Campbell v. Cannon*, continued.

In 1882 the House, by majority vote and for the disqualification of polygamy, excluded Delegate George Q. Cannon, who had not been sworn on his *prima facie* showing.

A Delegate-elect being excluded for disqualification, the House declined to seat the candidate having the next highest number of votes.

An argument that questions affecting qualifications should be instituted in the House alone and not by proceedings under the law of contest.

In 1882, in a sustained case, the major opinion of the Elections Committee inclined to the view that the constitutional qualifications for a Member did not apply to a Delegate.

An elaborate discussion of the status in the House of a Delegate from a Territory.

The question as to whether or not a law of Congress creating Delegates is binding on the House in succeeding Congresses.

Discussion of the effect, in the matter of qualifications of Delegates, of a law extending the Constitution over a Territory.

The third and last question arising is, Was he a polygamist at the time of his election; and if so, is that a disqualification?

On the question of fact there could be no doubt, for he had given the following written admission:

In the matter of George Q. Cannon. Contest of Allen G. Campbell's right to a seat in the House of Representatives of the Forty-seventh Congress of the United States as Delegate from the Territory of Utah.

I, George Q. Cannon, contestant, protesting that the matter in this paper contained is not relevant to the issue, do admit that I am a member of the Church of Jesus Christ of Latter-Day Saints, commonly called Mormons; that in accordance with the tenets of said church I have taken plural wives, who now live with me, and have so lived with me for a number of years, and borne me children. I also admit that in my public addresses as a teacher of my religion in Utah Territory I have defended said tenet of said church as being, in my belief, a revelation from God.

GEO. Q. CANNON.

Therefore there remains the question, Does the practice of polygamy disqualify a Delegate? This was the really important question at issue, both in the committee and in the debates on the floor. And its discussion involved the question of the status of Territorial Delegates as distinguished from the status of Members.

Mr. Calkins, in his views, said:

We are now brought face to face with the question whether this House will admit to a seat a Delegate who practices and teaches the doctrine of a plurality of wives, in open violation of the statute of the United States and contrary to the judgment of the civilized world. There are several clauses in our Constitution which may have some bearing on this subject.

Section 2, Article I, of the Constitution is as follows:

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States," etc.

SECTION 5.

"Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business. * * *"

CLAUSE 2.

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with a concurrence of two-thirds, expel a member."

AMENDMENT I, SECTION 1.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

ARTICLE IV, SECTION 3, CLAUSE 2.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

These are the provisions of the Constitution which may be held to have some bearing on the question of the qualifications of Delegates.

In the first place, Is a Delegate from a Territory a Member of the House of Representatives within the meaning of the Constitution? The second section of the first article says: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors in the most numerous branch in the State legislature." There is no provision in the Constitution for the election of Delegates to the House of Representatives or to the Senate. They are entirely the creature of statute. They are clearly not within the clause of the Constitution last above quoted, for the House is "composed of Members chosen every second year by the people of the several States;" and nothing is said of the Territories. Delegates have never been regarded as Members in any constitutional sense, because their powers, duties, and privileges on the floor of the House, when admitted, are limited. They may speak for their Territories; they may advocate such measures as they think proper; they may introduce bills and serve on committees; but they are deprived of the right to vote. And we doubt whether Congress could clothe them with the right to vote on measures affecting the people of the States or of the Territories, because they do not represent any integral part of the nation, but simply an unorganized territory belonging to the whole people. Hence Delegates are creatures of statute, and it would be competent at any time for the legislative branch of the Government to abolish the office altogether.

The writer of this report goes further than that. He holds that it is incompetent for Congress and the Executive to impose on any future House the right of Delegates to seats with defined qualifications. That is to say, when the several laws were passed giving the Territories the right to this limited representation, those laws were binding only on the lower House, which permitted them to be or made it possible for them to be passed, and were persuasive only to the Houses of future Congresses. For some purposes each House of Congress is a separate, independent branch of the Government. It is made so by the Constitution. For example, each House is the judge of the elections and returns of its own Members, and neither the Executive nor the Senate can interfere with that constitutional prerogative. Each House is independent in its expenditure of its contingent fund, and in the government of its own officers. It is independent in the formation of its own committees, in clothing them with power to take evidence, to send for persons and papers, and to investigate such matters as are within its jurisdiction. Each House is independent in its power to arrest and to imprison, during the session of the body, such contumacious witnesses as refuse to abide its order. In many other instances that may be cited each House acts independently of the other. And with reference to the election of Delegates, who (if they hold any office or franchise at all) can be nothing but agents representing the property and common territory of all the people, it operates only on the lower branch of Congress, for their election extends no right to them to interfere with the business of the Senate or to act as members thereof. This must not be construed into an opinion that the writer holds that the House of Representatives may disregard any law which Congress has the constitutional power to pass. Such laws are as binding upon this House as upon any citizen or court. Nor does the writer of this report mean to be understood that it is not competent for Congress to provide, under the Constitution, for legislative representation for Territories, but it is denied that Congress can bind the House by any law respecting the qualification of a Delegate. It can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. The qualification of Members is fixed by the Constitution. Hence they may not be added to or taken from by law. But as to Delegates, they are not constitutional officers. Their qualification depends entirely upon such a standard as the body to which they are attached may make. It is urged this means a legal qualification. This is admitted; but that legal qualification is remitted to the body to which the Delegate is attached, because it is the sole judge of that requisite. It is unfettered by constitutional restrictions and can not yield any part of this prerogative to the other branch of Congress or the Executive. If it could, the right to amend would follow, and the House might find itself in the awkward position of having the Senate fixing qualifications to Delegates, or the Executive vetoing laws fixing them, and by this means the power which by the Constitution resides alone in the House would be entirely abrogated.

It is claimed this is an autocratic power. This is admitted. All legislative bodies are autocratic in their powers unless restricted by written constitutions. In this instance there is no restriction.

It is contended that the act of Congress extending the Constitution and laws of the United States over the Territory of Utah, in all cases where they are applicable, extends the constitutional privilege to Delegates and clothes them with membership as constitutional officers of the House. We can not assent to that view. The very language of the act itself only extends the Constitution and laws over the Territory in cases where they are applicable. They can not be applicable to the election of a Delegate; for if they were, then Congress would have no authority to deprive a Delegate of the right to vote. To contend that the applicability of the Constitution in that respect extends to Delegates proves too much. It is clear, therefore, that that clause of the Constitution relative to the expulsion of a Member by a two-thirds vote cannot apply to Delegates, because they hold no constitutional office. It is equally clear that the clause of the Constitution relative to elections, returns, and qualifications of Members has no applicability except by parity of reasoning; and we do not dissent from the view that, so far as the qualification of citizenship and other necessary qualifications (except as to age) are concerned, they extend to Delegates as well as to Members. (Sec. 1906, R. S. U. S.) This is made so, probably, by the statute, expressly so to all the Territories except to Utah Territory, and inferentially to that Territory. It follows, as a logical sequence, that the House may at any time, by a majority vote, exclude from the limited membership which it now extends to Delegates from Territories any person whom it may judge to be unfit for any reason to hold a seat as a Delegate.

It can not be said that polygamy can be protected under that clause of the Constitution protecting everyone in the worship of God according to the dictates of his own conscience and prohibiting the passage of laws preventing the free exercise thereof.

It is true that vagaries may be indulged by persons under this clause of the Constitution when they do not violate law or outrage the considerate judgment of the civilized world. But when such vagaries trench upon good morals, and debauch or threaten to debauch public morals, such practice should be prohibited by law like any other evil not practiced as a matter of pretended conscience.

The views which we have just expressed render it unnecessary for us to discuss further the various propositions involved. In the face of this admission of Mr. Cannon we feel compelled to say that a representative from that Territory should be free from the taint and obloquy of plural wives. Having admitted that he practices, teaches, and advises others to the commission of that offense, we feel it our duty to say to the people of that Territory that we will exclude such persons from representing them in this House. In saying this we desire to cast no imputation on the contestant personally, because of his deportment and conduct in all other respects he is certainly the equal of any other person on this floor.

Mr. F. E. Beltzhoover, in his views, presented the question of qualification in a somewhat different light:

The only portion of the Constitution of the United States which refers to the Territories is Article IV, section 3, clause 2, which provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This clause of the fundamental law has received the most learned and elaborate consideration by the Supreme Court in *Scott v. Sanford* (19 Howard, 393, etc.), wherein, after going fully into the whole history of the Territories from the time of the first cession to the Government, it is held that this clause—

"Applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation."

To all other territory it is held that the Constitution does not extend, and can not be extended by Congress, except in so far as Congress may enact the provisions of the Constitution into a part of the organic law of such territory. This has been done in regard to Utah, first by the act of Congress which organized that Territory, and which provides that "the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

The Revised Statutes, sec. 1891, provides in somewhat different language, but of the same purport, that "the Constitution and all laws of the United States which are not locally inapplicable shall," etc.

The Constitution and all the laws of the United States are, therefore, a part of the statute law of the Territory of Utah, so far as they are applicable locally to that Territory.

Now, what was the design of the framers of the Constitution in reference to the territory which they provided for in the clause which we have quoted above? The history of the subject clearly shows that they intended to commit the unorganized territories wholly to the discretion and unlimited power of Congress. This is so decided by the courts in all the cases in which the subject is considered; this was so held in *Scott v. Sanford* (supra), and Judge Nelson, in *Benner v. Porter* (9 Howard, 235), says:

"They are not organized under the Constitution nor subject to its complex distribution of the powers of government or the organic law, but are the creatures exclusively of the legislative department, and subject to its supervision and control."

It is held by Judge Story that "the power of Congress over the public Territories is clearly exclusive and universal, and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled." (Story, Constitution, sec. 1328; Rawle, Constitution, p. 237; 1 Kent's Commentaries, p. 243.)

The Supreme Court of the United States, in a very recent case, says: "The power is subject to no limitations." (*Gibson v. Chouteau*, 13 Wall. 799.)

See also *Stacey v. Abbott* (1 Am. Law, T. R., 94), where it is held by the supreme court of one of the Territories that they "are not organized under the Constitution; they are exclusively the creatures of Congress."

But there is something more shown by the history of the clause in the Constitution in reference to Territories and by the decisions of the courts thereon. It is clear from both these that it was never intended that the status of the Territories should in any respect approach so near the character and position of sovereign States as to require that whatever agents these Territories might be entitled to on the floor of Congress, should have the status and qualifications of Members of Congress. The Territories in the minds of the framers of the Constitution had none of the rights and attributes of the States. No other parts of the Constitution were made to apply to them except the clause we have quoted. On the contrary, they were spoken of as property, and power was given to Congress to dispose of them as property, and to make all needful rules and regulations respecting them as other property of the United States. They were put in the same category with the other chattels of the Government. There is, therefore, nothing in the Constitution which will justify us in believing in the light of its history that the qualifications of agents who might be appointed to look after the interests of the Territories on the floor of Congress should be the same or even like those of Members of Congress. This is so, we maintain, with regard even to that Territory over which the Constitution extends directly and immediately, because it was within the control of the Government at the time the Constitution was framed. If, therefore, the Constitution did not contemplate the requirement of such qualifications for Delegates as agents of the Territory within its immediate purview, with much less plausibility can it be contended that it should require them where it is only extended as a part of the statute law. The Constitution clearly puts it in the power of Congress to say at any time and in any way it may see proper what qualifications it will exact of the agents whom as a matter of grace and discretion it permits to come from the Territories into its deliberations, and to sit among its Members. Neither the Senate nor the Executive, nor any other power on earth, has any right to interfere except by permission in fixing the qualifications for admission to the House; and the concurrence and cooperation of the Senate and Executive in the passage of any enactment on the subject can go no further in giving it force and validity than to make it a persuasive rule of action which the House is at liberty to follow or disregard." Each House shall be the judge of the election, returns, and qualifications of its own members." No law that was ever passed on this subject, which is under the exclusive and unlimited control of Congress, by any former Congress is binding on any subsequent Congress. Each Congress may wholly repudiate all such acts with entire propriety. It is customary to regard them as rules of conduct. This is well illustrated by the doctrine laid down by McCrary in his Law of Elections, section 349, in reference to the laws made to govern contested elections:

"The Houses of Congress, when exercising their authority and jurisdiction to decide upon the

election, returns, and qualifications' of Members, are not bound by the technical rules which govern proceedings in courts of justice. Indeed, the statutes to be found among the acts of Congress regulating the mode of conducting an election contest in the House of Representatives are directory only, and are not and can not be made mandatory under the Constitution. In practice these statutory regulations are often varied, and sometimes wholly departed from. They are convenient as rules of practice, and of course will be adhered to unless the House, in its discretion, shall in a given case determine that the ends of justice require a different course of action. They constitute wholesome rules, not to be departed from without cause. It is not within the constitutional power of Congress, by a legislative enactment or otherwise, to control either House in the exercise of its exclusive right to be the judge of the election, returns, and qualifications of its own Members.

"The laws that have been enacted on this subject being therefore only directory and not absolutely binding, would have been more appropriately passed as mere rules of the House of Representatives, since by their passage it may be claimed that the House conceded the right of the Senate to share with it in this duty and power conferred by the Constitution. It is presumed, however, that the provisions in question were enacted in the form of a statute rather than a mere rule of the House, in order to give them more general publicity, etc."

It is also important to observe the wide distinction which Congress has always made between the powers and status of a Member of Congress and a Delegate from a Territory.

A Member of Congress is sent by a State by virtue of its irrefragable right to representation under the Constitution of the United States. This right Congress can not abrogate or control or limit or modify in any way.

A Delegate is an agent of a Territory, sent under the authority or permission of an act of Congress. This right or permission is subject to the merest whim and caprice of Congress. It can be utterly wiped out or modified or changed just as Congress may see proper at any time.

A Member of Congress must have certain qualifications under the Constitution.

A Delegate need have none but what Congress sees fit to provide.

A Member of Congress is the representative and custodian of the political power and interests of a sovereign State, which is itself a factor and part of the Government.

A Delegate has no political power, but is only a business agent of the Territory, for the purest business purposes. He has no right to vote or aid in shaping the policy of the Government in war or peace.

A Member of Congress is an officer named in the Constitution of the United States, and contemplated and provided by the framers thereof at the time of the organization of the Government. He is a constitutional officer.

A Delegate is not a constitutional officer in the remotest sense. There were no Delegates mentioned or thought of by the framers of the Constitution.

A Member of Congress is chosen under section 2, Article I, of the Constitution, which provides that—

"The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

This specifically and definitely and indubitably fixes how and where and by whom Members of Congress shall be chosen and what qualifications they must imperatively have. "No person shall be a Representative," etc., without these qualifications.

A Delegate is chosen under section 1862 of the Revised Statutes, which provides that—

"Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters of the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

This fully and very clearly provides how Delegates shall be chosen and what power they shall have, but does not exact or provide any qualifications or hint at any. This is the same provision substantially which has been made for Delegates from 1787 down to this time. The provision in the act of July 13, 1787, for the government of the Northwest Territory, is that the joint assembly of that Territory "shall have

authority, by joint ballot, to elect a Delegate to Congress, who shall have a seat in Congress with the right of debating, but not of voting.”

These few marked points of distinction between the two offices not only show that the constitutional qualifications for members do not apply to Delegates, but that none of the legislation which has ever been enacted on the subject seems to have been founded on the belief that they did.

CONGRESS HAS ADDED TO THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS; WHY NOT OF DELEGATES.

But admitting for the purposes of this discussion, what can not be maintained, that the same qualifications which entitle a Member of Congress to admission shall also entitle a Delegate to the same right, and I still hold that Congress has the right and power to say that a polygamist shall not be admitted as a Delegate. Under the high power inherent in every organization on earth to preserve its integrity and existence Congress has the indubitable right to keep out of its councils any person whom it believes to be dangerous and hostile to the Government.

During the war almost the whole Congressional delegation from the State of Kentucky were halted at the bar of the House, and, on the objection of a Member, were not permitted to be sworn until it was ascertained whether they or either of them were guilty of disloyal practices. They had each every qualification usually required by the Constitution; they were duly and regularly elected and returned; they were sent by a sovereign State, holding all her relations in perfect accord with the Federal Government; but the House proceeded to inquire into each case, and not until a reasonable investigation was had were any of them admitted. The committee which had the matter in charge reported, and the House adopted and laid down, the following rule on the subject of all such cases:

“Whenever it is shown by proof that the claimant has, by act of speech, given aid or countenance to the rebellion he should not be permitted to take the oath, and such acts or speech need not be such as to constitute treason technically, but must have been so overt and public, and must have been done or said under such circumstances, as fairly to show that they were actually designed to, and in their nature tended to, forward the cause of the rebellion.”

In the case of John Young Brown, who was among the number, the committee almost unanimously reported against his right to admission on the ground that he had written an imprudent and disloyal letter; nothing more. He had never committed an act of treason. He was never arrested or tried or convicted. He denied all treasonable intent in the letter and made every effort in his power to explain and extenuate his offense. But seven out of the nine members of the Committee on Elections of the Fortieth Congress reported that he “was not entitled to take the oath of office, or to be admitted to the House as a Representative from the State of Kentucky.” This report was adopted by the House by a vote of 108 to 43. The minority report in that case made an argument against the action of the majority in almost the same words and on identically the same grounds that the minority of the Committee on Elections occupy in the case under consideration. It was argued that Mr. Brown had all the constitutional qualifications, and that Congress had no right to exact more; that in any event he had never been tried or convicted of treason, and unless convicted of the crime even treason was no disqualification. But Congress then laid down the rule above given, and never abrogated since, that, in addition to the ordinary constitutional requirements, every man must be well disposed and loyal toward the Government before he can be admitted to Congress to aid in forming its policy and controlling its destinies.

The act of July 2, 1862, providing what is known as the iron-clad oath, added a new and marked qualification to those required of Members of Congress prior to that time, and every Member who has taken that oath since has submitted to the exaction of that additional qualification. The distinguished counsel who argued the case of Mr. Cannon before the Committee on Elections felt the force of this act, and the long-continued practice of Congress under it and explained it as a war measure. He said:

“The grounds upon which this law was vindicated, although not stated with much care or precision, are nevertheless clearly enough disclosed by the debates. It was enacted as a war measure. The iron-clad oath was adopted as the countersign which should, in time of war, exclude domestic enemies from the civil administration of the Government, in the same manner and for the same reason that the military countersign was employed to exclude those enemies from the military lines of the army. It was enacted as a measure of defense against an armed enemy in time of war, and was as necessary and as justifiable as any other war measure not specifically marked out in the text of the Constitution.”

If Congress could, almost without challenge, provide and add such a distinct and imperative qualification, not for Delegate but for a Member of Congress, in 1862, why may we not in 1882 ask a reasonable additional qualification for a Delegate from a Territory who does not come within the letter or spirit of the Constitution? The act of 1862 was a bold and radical assertion of the doctrine of self-preservation on the part of Congress to maintain its integrity and the purity and loyalty of its counsels. The resolution recommended by the majority of the Committee on Elections only says to the people of Utah, you shall not abuse the privilege of representation which we allowed you on the floor of Congress, by sending as your Delegate a person who adheres to an organization that is hostile to the interests of free government, and whose doctrines and practices are offensive to the masses of the moral people of the great nation we represent.

CONCLUSION.

The following is a summary of the reasons for my concurrence in the resolutions of the majority of the committee:

1. The history of the cession and organization of the Territory, which belonged to the Federal Government at the time of its formation, the history of the clause in the Constitution which relates to that Territory, and the Constitution itself, all show clearly that it was not contemplated or intended that Delegates which might be sent from said Territory, then immediately under the Constitution, should have the same qualifications as Members of Congress.

2. The Constitution does not extend over Utah, except as a part of the statute law provided for that Territory by Congress, and there is, therefore, more reason for holding that the qualifications required for Members of Congress by the Constitution do not extend to Delegates from that Territory than there is in relation to Delegates from Territory immediately under the Constitution.

3. The Constitution not only does not provide that Delegates shall have the same qualifications as Members of Congress, but no law, in almost a century of legislation on the subject, has so provided.

4. There is no reason why the qualifications of Delegates should be the same as those of Members of Congress. Their status and duties and powers are widely different, and their qualifications should be made to conform to those powers and duties, which in case of Delegates are purely of a local and business character.

5. The Territories can only be held and governed by Congress with one single purpose in view, which is to adapt and prepare them for admission as States of the Union. It will hardly be contended that Utah will ever be admitted as a State while polygamy dominates it, or that it is preparing it for admission as a State to hold out to its people the delusive doctrine that a polygamist is not disqualified as a Member of Congress, and therefore that polygamy is no bar to the admission of Utah to the Union.

6. No law fixing the qualifications of Delegates passed by any former Congress would be binding on any subsequent Congress. Each House shall be the judge of the qualifications of its own Members, and, for a much stronger reason, it should be the exclusive judge of the qualifications of the Delegates, which are its creatures and which it admits as matter of its own discretion.

7. Congress has held, from 1862 down to this time, that it has the right to prevent the admission of persons as Members who are hostile to the Government by excluding them on that ground, although they possess all the other qualifications required by the Constitution; with much more propriety, and much less stretch of power, Congress has the right to exclude a Delegate who is not well disposed toward the Government, and who openly defies its laws.

Mr. Ambrose A. Ranney, of Massachusetts, took a different view as to the course of procedure desirable:

2. I agree in the main with the report of the chairman, wherein he says, in substance, that it is clear that the clause of the Constitution relative to elections, returns, and qualifications of Members applies and extends to Delegates, and that substantially the same qualifications (unless it be as to age) are prescribed for both Member and Delegate.

I would add to the concession the assertion that the rule of construction which has been established in regard to Constitution relating to Members, to wit, that other qualifications can not be added to those specified, and none taken away, applies for the same reason to Delegates, when the qualifications for them are prescribed and specified by statute; also, what is undoubted law, that judging of the qualifi-

cations comprehends only a determination of the question whether the Member or Delegate answers the qualifications prescribed as the conditions of his eligibility.

The manifest intent of the Constitution was to fix certain things as unalterable conditions of eligibility, and leave all else for the electors to judge of and determine for themselves. Congress has shown the same intention in statutes erecting Territorial governments, and giving a right of qualified representation. So firmly has the House adhered to this fundamental principle of a representative government that the uniform rule of Congress has been not to entertain questions of alleged bad personal character in judging of what are called "qualifications." In exercising the right of expulsion even the established rule has been not to expel for bad character or even crimes committed before the election and known to the electors at the time. (McCrary, secs. 521, 522, 523.) A few cases connected with the rebellion, and arising out of known disloyalty, are exceptions, but they stand on different grounds. A Delegate's power was so limited and circumscribed that some of the organic acts did not even prescribe citizenship as a condition of eligibility, and Congress held it to be implied, as in the Michigan case. (White's case, Hall and Clark, p. 85.)

It follows that all this committee has to do on this point is to see whether Mr. Cannon was eligible or had the prescribed qualifications.

3. It is sought to avoid the conclusion to which the doctrine of the last point leads, on what I consider most untenable and dangerous grounds. They contravene fundamental principles of law, and a practice which has existed from the beginning of the Government.

Mr. Strong, in 1850, then on Election Committee of the House, since an illustrious judge upon the bench of the United States Supreme Court, has forcibly illustrated and stated that all admissions of Delegates to a seat are by virtue of established laws, and not by grace or within the discretion of the House. (See Smith's case, Messervy's case, Babbitt's case, 1 Bartlett, pp. 109, 117, 116.) Showing that he has been admitted only by right from the formation of the confederation down to the Constitution, and since to this time.

It is said that a Delegate is not named in the Constitution and is not the creature of the same, while a Member is, and that his admission to a seat is *ex gratia*. The legal purport of the opposite contention, when expressed in words, is: "It is incompetent for Congress and the Executive to impose on any future House the right of a Delegate to a seat;" "they (the acts) were persuasive only to the Houses of future Congresses;" and, "in short, it may be said that Delegates sit in the lower House by its grace and permission, and that it makes no difference whether that permission is expressed in a statute or in a mere resolution of the House. The House can disregard it and refuse to be bound by it, because it affects (somewhat) the organization and membership of the House alone."

It does not change the legal purport, in my judgment, to say Congress had no power to impose upon the House a Delegate "with defined qualifications." I concede that powers could not be conferred upon a Delegate which would infringe upon the constitutional rights of State representation or those of a full Member.

The gist of this doctrine is that a statute which the Constitution authorizes Congress to make may be set aside and made null and void at the pleasure of one branch of the lawmaking power.

If the Constitution authorizes Congress to enact the statutes relating to the Territories, and give a Delegate, duly elected and returned, with the requisite qualifications, a right to a seat and to debate, without a right to vote, no power under heaven can rightfully deprive him of these rights and privileges except Congress itself, by some other statute passed by both Houses.

The doctrine must lead to this: That the statutes organizing the Territories, with such powers and rights, are not authorized by the Constitution, and are void, unless the House sees fit to observe them. But this clause of the Constitution has been sanctioned and sustained as authorizing such things too often to require any discussion of the subject.

How the sitting of a Delegate can be said to infringe upon any constitutional rights of a Member I fail to see. Nobody pretends that the statute attempts to make him a Member in the full sense of that term, and he is not a creature of the Constitution in the exact sense of that term, but he is a creature of a statute which that instrument authorizes, and can subsist and enjoy his rights and privileges without infringing upon the constitutional rights of a Member, and that is enough to sustain the statute as valid; and, if so, it is not merely "persuasive" on all future Houses, but absolutely binding on their consciences, and must be obeyed. It can be disregarded only in the exercise of a power without the right, as a sort of usurpation of authority.

The right of representation on the part of the Territory and of a Delegate to his seat has always been accorded as such, and not as a grace or favor, save as the grace and favor of Congress, and not of one House alone. The doctrine contended for strikes at the very root of the right of representation conferred, and commits the Delegate to the discretion and caprice of the House, instead of the full law-making power.

"The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities, but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. * * *

"It may do for the Territories what the people under the Constitution of the United States may do for the States." (Waite, Ch. J., in *Bank v. County of Yankton*, 101 U. S., 133.)

It follows that Congress, and Congress alone, can give rights by statute law, adopting and applying, if they please, the principles of the Constitution so far as they can be made applicable, and imposing likewise reciprocal obligations upon every other branch of the Government and the people, so the rights conferred may be guaranteed and enforced.

The section 1891 of the Revised Statutes extends over Territories the laws and Constitution of the United States, except so far as locally inapplicable, and this was designed to give a representative form of government and republican institutions to Territories, which were incipient or prospective States, and give the Constitution effect as law, with reciprocal rights and obligations.

A Delegate becomes in one sense a Member, and yet not properly so called. He is enough so to render applicable in spirit the law in regard to contested elections, which in terms applies only to Members, the clause of the Constitution which makes the House judges of the qualifications, returns, etc., of the Members and the other one which relates to the expulsion of Members. (*Maxwell v. Cannon*, Forty-third Congress.)

The analogy, if justified at all, must be carried and applied all through, and such has been the uniform precedent and practice heretofore. The law should not be changed to meet the strain of a special desire in an individual case.

The discussion in *Maxwell v. Cannon* covers the whole subject-matter, and I adopt its doctrine in the main.

I feel very clear that the organic act of Utah and the Revised Statutes, including sections 1860, 1862, and 1863, are constitutional and valid and as such binding upon the House as much as on anybody else.

Section 1862 reads: "Every Territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting."

It is to be observed that the language is, "shall have a seat," etc., and we may as well reject everything else as that.

4. It follows, in my judgment, that Mr. Cannon, being eligible and duly elected and returned, makes out his legal right to a seat under the statutes, and having found thus much his "final right" is determined, subject only to the right which the House has to expel him by a two-thirds vote.

The resolution of reference is not to determine which claimant has the strongest case of favor or grace, but which has the "right," i. e., the legal right, and we must find this much only. If no legal right whatever, then we can find that and say so only under this resolution.

5. The only objection urged is polygamy.

My position on that point is: It is not a disqualification affecting the legal right, but concerns only the dignity of the House, and an investigation into matters which concern that alone must be instituted in the House, and can not be started in a contest made by a contestant; for the contest embraced and committed to the committee under chapter 8, page 17, Revised Statutes, affects only the legal right. (*Maxwell v. Cannon*, adopted by McCrary, S. 528.)

The reason for it is apparent and sound, otherwise any outsider, or pretender, or a real contestant, or contestee, may proceed to take evidence of and spread upon the record any amount of scandal or any charge affecting the moral character the private character of any Member of the House.

The House must alone proceed to vindicate its own dignity and character, and does not allow anyone outside of it to start and take evidence for them on that subject unless by special order. Such an investigation is usually referred to a special committee.

The principle involved is of more importance than the seating or unseating of any one Member.

I agree with all that is in the report against polygamy, and in the duty of Congress to obviate by law its evils, so far as is possible, but let it be done by law and not in violation of law.

If Mr. Cannon is eligible under existing law and was duly elected and returned, as we find, we give him his legal right to a seat because the law (sec. 1862) says he shall have it.

We can then exercise our right and expel him under another independent provision of the Constitution upon a proceeding started and conducted in the usual and the legal way. We have his admission, put in under protest, and may act on that if sufficient and if he does not demand a hearing.

Minority views signed by Messrs. S.W. Moulton, of Illinois; Gibson Atherton, of Ohio; L.H. Davis, of Missouri; and G.W. Jones, of Texas, took the view that Mr. Cannon was not disqualified, and was entitled to the seat.

The grave and important question as to whether polygamy is a disqualification for the office of Delegate from the Territories we think is settled by the Constitution, the laws, and the uniform practice of the Government since its formation, now nearly one hundred years.

As to who shall hold seats in Congress, there are two distinct provisions of the Constitution:

Section 5, Article I of the Constitution is as follows:

"Each House shall be the judge of the elections, returns, and qualifications of its own Members; and a majority of each shall constitute a quorum to do business. * * *"

This provision in its operation requires only a majority vote.

Such has been the general practice of the House.

The other provision is, "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." (Second clause, sec. 5, Art. I.)

The qualifications of Representatives are prescribed by the second section of the first article of the Constitution: They shall be 25 years of age, seven years a citizen of the United States, and, when elected, be inhabitants of the State in which they shall be chosen.

This committee is to report upon "the prima facie right or the final right of the claimants to the seat as the committee shall deem proper."

It must be conceded, as we have seen, that Cannon has an overwhelming majority of the votes cast for Delegate to Congress.

We think, also, it must be conceded, from the facts evidenced in the case by the record, that Cannon possesses the constitutional qualifications prescribed by second section of Article I of the Constitution.

Mr. Cannon, at the time of his election, was over 25 years of age, had been seven years a citizen of the United States, and was an inhabitant of the Territory in which he was chosen. These are the only qualifications to be considered.

There is no power, State or Federal, under the Constitution by which these qualifications can be changed, enlarged, or modified in any manner.

The authorities upon this question are all one way.

In the report of the Committee on Elections of the House in the Forty-third Congress, in the case of Maxwell against Cannon, and upon this point, the committee say:

"The practice of the House has been so uniform and seems so entirely in harmony with the letter of the Constitution that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified."

This is the rule we think should be applied to the case before the House.

The following are some of the authorities on this point: Story on the Constitution, sections 625-627; the contested-election cases of *Fouk v. Trumbull* and *Turney v. Marshall* from the State of Illinois (1 Bartlett, 168; McCrary, Election Laws, sections 227, 228, 252); *Donnelly v. Washburn*, Forty-sixth Congress; the case of *Wittmore* in Forty-first Congress; the case of *Matteson* in the Thirty-fifth Congress; the case of *Benjamin G. Harris*, are all in point.

But it is said that it may be conceded that the rule above stated as to the power of the House relating to Members is correct, but that a Delegate from the Territories is not a constitutional officer, and does not as to qualification stand upon the same ground as a Member from a State, and that the constitutional provision does not apply to a Delegate; that he is a nondescript, and has no right and can claim no protection under the Constitution.

So far as our research has extended since the formation of the Government we can find no case reported that makes any distinction between the qualifications of a Member from a State and a Delegate from the Territory.

Whenever that question has arisen the rule as to qualifications has been the constitutional provision, and this has been applied to the Delegates from the Territories. The case of James White, decided in 1794, is not an exception.

It may be that in express terms the Constitution does not apply to Territories; but the spirit and reason of the Constitution does apply and establishes a proper standard.

If the constitutional standard is not adopted as to qualifications, then there is no rule for the government of the House as to Delegates.

The House at this session may establish one rule, and the next session may revoke or establish another and different one, and the right of a Delegate would be wholly uncertain.

There are laws that have been passed by Congress touching this subject that give color to the views we present. These laws show that a Delegate, except as to a vote in the House, is put upon the same footing as a Member from a State.

Besides, there has always been the same practice from the formation of the Government as to Delegates and Members by referring their cases to the Committee on Elections, both being treated alike in this respect.

The time, manner, and places of elections of Members of Congress, including Delegates from the Territories, are prescribed and made the same by 14 United States Statutes, sections 25, 26, and 27.

By section 30, Revised Statutes, the oath of office of Members of Congress and Delegates from the Territories is prescribed, and is the same for a Delegate as a Member.

It is important to remark that this statute was passed June 1, 1789, and has ever since been the law.

Section 35, Revised Statutes, provides that Members and Delegates are to be paid the same salary. Section 51 provides that vacancies in the case of Delegates are to be filled in the same way as in case of Members.

The organic law for Utah, September, 1850, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

This is a law of Congress passed by virtue of the Constitution, and is binding on Congress until repealed.

Now, why is the provision of the Constitution relating to qualification of Members not applicable to the Territories? What reason can be given why it should not apply? What better standard for qualification can be made?

The adoption of the rule establishes uniformity and certainty, the operation is salutary, and its adoption since the formation of the Government demonstrates its advantages and necessity.

The argument is made that a Delegate is not a constitutional officer, and, therefore, not a Member of the House in the sense of the Constitution, and that the House may seat or unseat a Delegate at will.

We believe this is the first time since the formation of the Government that this argument has been advanced.

If a Delegate from a Territory is not a Member by virtue of the Constitution and laws, then what rule or law do you apply to him? Is it the arbitrary will or caprice of the House at each session?

If, as is said, a Delegate is not a Member, certainly you can not invoke any provision of the Constitution as to qualification or expulsion.

The constitutional rule wholly fails upon this theory.

It would follow from this view that the constitutional right of the House to judge of the election, returns, and qualifications of its Members does not apply to Delegates, and therefore the House is without constitutional power in the premises, and that whatever power the House possesses as to Delegates it must be derived from some other source.

The extraordinary and dangerous doctrine is advanced by the majority of the committee—

"That the Delegates sit in the lower House by its grace and permission, and it makes no difference whether that permission is expressed in a statute or mere resolution of the House.

"The House can at any time disregard it and refuse to be bound by it.

"It [Congress] can not affix a qualification by law for a Delegate and bind any House except the one assenting thereto. Congress cannot bind the House by any law as to the qualification of a Delegate."

Our opinion is that it is competent for Congress, by a proper statute, to provide for the election in the Territories of Delegates to Congress, under Article IV, section 3, clause 2:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

It has been decided under this article of the Constitution a great many times that it gives Congress the right to legislate for the Territories, and to make such laws and rules as may be for the advantage of the Territories and of the country.

Now, under this clause of the Constitution, if, in the opinion of Congress, in making needful rules and regulations respecting the Territories, it should be necessary to provide for the election of a Delegate from said Territory to this House, and Congress should so provide that said Delegate should have a seat and the right to debate, could the House alone nullify that law and refuse to seat the Delegate?

Why is not the House bound by constitutional laws? What right has the House to nullify and refuse to obey a law it has helped to make?

We have already referred to various laws of Congress making express provisions for the election of Delegates from the Territories, giving them a right to a seat in the House, and generally applying the same rules to Delegates as Members, except Delegates have not the right to vote.

Also, as we have seen, the organic law of Utah adopts the Constitution and laws of the United States, so far as applicable, as a part of that organic law.

Also, section 1891, Revised Statutes, gives the Constitution and laws force and effect in all the Territories, so far as applicable.

The law-making department of the Government has made these various laws in a constitutional way, and until repealed they are binding upon every individual in the land and every department of the Government, including Congress. No one is above the laws in this country.

Certainly one House alone can not repeal a law of Congress nor nullify it by any direct or indirect proceeding. It is absolutely bound by the law.

If Congress has the right to make a law and provide for the election of Delegates to this House, and if the constitutional qualifications do not apply to them, and there is no statute fixing their qualifications, it would seem to follow that the House would be bound to admit as a Delegate under the law such persons as the people of the Territory might elect to represent them, however obnoxious they might be to the House. The people of the Territory being satisfied, no one else can complain.

Suppose Congress should pass a law providing that Cabinet officers should be allowed seats in the House, with the privilege of answering questions put to them relating to the Executive Department, and the other Departments of which they were chief, and with the right to debate.

Then, could the House refuse to permit these officers seats and the privileges accorded to them under the law?

Could the House refuse them a seat on the ground that they were not qualified, and set up some fanciful standard of qualifications not prescribed by the statute?

Could the House exclude them under the law upon the ground that they were heretics, or Mormons, or polygamists—Catholics, Democrats, Republicans, or Greenbackers?

Would not the House be bound to obey the law that had been made by Congress and permit the Cabinet to seats, however offensive they might be personally?

The logic of the majority of the committee is that one House alone could nullify the laws and exclude ad libitum.

In the Forty-third Congress, in the case of *Maxwell v. Cannon*, precisely the same question was involved in that case as in the one before the committee.

The question was stated this way:

"That George Q. Cannon is not qualified to represent said Territory or to hold his seat in the Forty-third Congress, for the reason, as shown by the evidence, that he, on and before the day of the election, in, August, 1872, was openly living and cohabiting— with four women, as his wives, in Salt Lake City, in Utah Territory, and he is still living and cohabiting with them."

On the question of qualifications, and the effect of making the Constitution a part of the law by act of Congress, the committee say:

"It being conceded that the contestee has these qualifications, one other inquiry only under this head remains, to wit: Does the same rule apply in considering the case of a Delegate as a Member of this House? This question seems not to have been raised heretofore. The act organizing the Territory of Utah, approved September 9, 1850, enacts that the Constitution and laws of the United States are hereby extended over, and declared to be in force in, said Territory of Utah, so far as the same, or any provision thereof, may be applicable. It was said, on the argument, that the Constitution can not be extended over the Territories by act of Congress, and the views of Mr. Webster were quoted in support of this position.

"We do not deem it necessary to consider that question, because it will not be denied that Congress had the power to make the Constitution a part of the statutory law of the Territory as much as any portion of the organic act thereof. For the purposes of this inquiry it makes no difference whether the Constitution is to be treated as constitutional or statutory law. If either, it is entitled to be considered in disposing of this case."

Upon this point there does not seem to have been any difference of opinion in the committee.

The committee, in the same case, referring to the question of polygamy, say:

"The question raised in the specification of contestant's counsel, and above transcribed, is a grave one, and unquestionably demands the consideration of the House. This committee, while having no desire to shrink from its investigation, finds itself confronted with the question of jurisdiction under the order referring the case.

"The Committee on Elections was organized under and pursuant to article 1, section 5, of the Constitution, which declares: 'Each House shall be the judge of the elections, returns, and qualifications of its own Members.' The first standing committee appointed by the House of Representatives was the Committee on Elections. It was chosen by ballot, on the 13th day of April, 1789; and from that time to this, in the vast multitude of cases considered by it, with a few unimportant exceptions, in which the point seems to have escaped notice, the range of its inquiry has been limited to the execution of the power conferred by the above provision of the Constitution.

"What are the qualifications here mentioned and referred to the Committee on Elections? Clearly, the constitutional qualifications, to wit, that the claimant shall have attained the age of 25 years, been seven years a citizen of the United States, and shall be an inhabitant of the State in which he shall be chosen. The practice of the House has been so uniform, and seems so entirely in harmony with the letter of the Constitution, that the committee can but regard the jurisdictional question as a bar to the consideration of qualifications other than those above specified, mentioned in the notice of contest, and here in before alluded to.

"We conclude that the question submitted to us, under the order of the House, comes within the same principles of jurisdiction as if the contestee were a Member, instead of a Delegate."

The minority said:

"It is admitted in the report, and the fact has not been and is not denied, that Mr. Cannon possesses the constitutional qualifications, unless the qualifications of a Delegate in Congress from a Territory differ from the qualifications fixed by the Constitution for a Member of the House. There can be no sufficient reason assigned for the position that the qualifications are any different.* * * The line of demarkation between these two great powers of the House, the power to judge of the elections, returns, and qualifications of its own Members, by a mere majority vote, and the power to expel its Members by two-thirds vote, is clear and well defined."

The "views" of the minority on the point were further expressed in these words:

"But a graver question than those we have considered is the question whether the House ought, as matter of policy, or to establish a precedent, to expel either a Delegate or Member on account of alleged crimes or immoral practices, unconnected with their duties or obligations as Members or Delegates, when the Member or Delegate possesses all the qualifications to entitle him to his seat.

"If we are to go into the question of the moral fitness of a Member to occupy a seat in the House, where will the inquiry stop? What standard shall we fix in determining what is and what is not sufficient cause for expulsion? If a number of Members engage in the practice of gaming for money or other valuable thing, or are accused of violating the marital vow by intimate association with four women, three of whom are not lawful wives, or are charged with any other offense, and a majority of the House,

or even two-thirds, expel them, it may be the recognition of a dangerous power and policy. If exercised and adopted by one political party to accomplish partisan ends, it furnishes a precedent which it will be insisted justifies similar action by the opposite party, when they have a majority or a two-thirds majority in the House; and thus the people are deprived of representation, and their Representatives, possessing the necessary qualifications, are expelled for causes outside of the constitutional qualifications of Members, or those which a Delegate must possess, so far as his qualifications are fixed by reason or analogy, or are drawn from the principles of our representative system of government."

It may be stated that the reports, both of the majority and minority, were made by Republicans.

That is a precedent that covers the case before this committee in every particular. It was exhaustively discussed in the committee and in the House, and was adopted by the House by an overwhelming majority, and it stands today as the rule and law of the House, unless it shall be reversed.

The issue in that case was sharply made, and the rule established that Delegates from Territories are entitled to the benefit of the constitutional limitations as to qualifications, and that polygamy was not a disqualification.

Now, if the rule that has been established and practiced since the formation of the Government as to qualification for Members and Delegates to the House is to be reversed and a different rule adopted, what standard shall it be?

This House may exclude a Member on a charge of polygamy. The next House may exclude a person elected because he is a heretic or a Catholic or a Methodist, or because he had been charged by his opponent with adultery or some other offense.

Everyone can see that such a rule or license would be dangerous to the rights and liberties of the citizens and an end to republican government.

The party in power would be governed by arbitrary will and caprice alone.

Mr. Cannon, the contestant here, claims in good faith that polygamy is a religious conviction and principle with him and his people, and in this he is entitled to protection under the Constitution.

The people he represents have elected him and are satisfied with him, and this House should be content.

The sixth article of the Constitution provides that—

"No religious test shall ever be required as a qualification for any office of public trust under the United States."

It seems to us that the contestant is entitled to the above provision of the Constitution as a protection. He has been convicted of no crime and there is no law on the statute book that disqualifies him as a Delegate.

On the majority view that Mr. Cannon was disqualified and should be excluded another question arose as to whether or not Mr. Campbell should be admitted to the seat. The majority of the committee took the view that as he had only a minority of the votes he could not be admitted under the American practice.

The question was debated at length on April 18 and 19, 1882,¹ the main point at issue being the status of a Delegate in reference to qualifications. On the latter day the resolution of the minority declaring Mr. Cannon elected and entitled to the seat was offered as a substitute for the majority resolutions and was disagreed to—yeas 79, nays 123.

Then the resolutions of the majority were agreed to without division,² as follows:

Resolved, That Allen G. Campbell is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That George Q. Cannon is not entitled to a seat in this Congress as a Delegate from the Territory of Utah.

Resolved, That the seat of the Delegate from the Territory of Utah be, and the same hereby is, declared vacant.

¹ Record, pp. 2001, 3045–3075.

² Journal, pp. 1072–1074.

474. The case of Brigham H. Roberts, in the Fifty-sixth Congress.

The House declined to permit the oath to be administered to Brigham H. Roberts pending an examination of his qualifications by a committee.

In 1899 a Member who challenged the right of a Member-elect to be sworn did so on his responsibility as a Member and on the strength of documentary evidence.

In 1899 a Member-elect, challenged as he was about to take the oath, stood aside on request of the Speaker.

The House, by unanimous consent, deferred until after the completion of the organization the question of Brigham H. Roberts's right to take the oath.

The right of Brigham H. Roberts to take the oath and his seat being under consideration, he was permitted to speak, by unanimous consent.

In 1899 the House referred the case of Brigham H. Roberts to a committee, with directions to report on both the prima facie and final right.

In the case of Brigham H. Roberts the committee reported at one and the same time on both the prima facie and final right.

On December 4, 1899,¹ at the time of the organization of the House, and while the swearing in of the Members was proceeding, the State of Utah was called. Thereupon Mr. Robert W. Tayler, of Ohio, said:

Mr. Speaker, I object to the swearing in of the Representative-elect from Utah and to his taking a seat in this body. I do so, Mr. Speaker, on my responsibility as a Member of this House, and because specific, serious, and apparently well-grounded charges of ineligibility are made against him. A transcript of the proceedings of court in Utah evidences the fact that the claimant was in 1889 convicted, or that he pleaded guilty, of the crime of unlawful cohabitation. Affidavits and other papers in my possession indicate that ever since then he has been persistently guilty of the same crime, and that ever since then he has been and is now a polygamist. If this transcript and these affidavits and papers tell the truth, the Member-elect from Utah is, in my judgment, ineligible to be a Member of this House of Representatives both because of the statutory disqualification created by the Edmunds law and for higher and graver and quite as sound reasons. I ought also to say, in addition to what I have just said, that I have in my possession a certified copy of the court record under which the claimant to this seat was supposed to be naturalized, and that eminent counsel assert that if that be the record in the case there is grave doubt if the claimant is a citizen of the United States. I offer and express no opinion upon that proposition.

Mr. Speaker, if it were possible to emphasize the gravity of these charges and of the responsibility that is at this moment imposed upon this House, we will find that emphasis in the memorials, only a small part of which could be physically cared for in this Hall, but all of which I now present to the House, from over 7,000,000 American men and women, protesting against the entrance into this House of the Representative-elect from Utah.

The Speaker requested the Member-elect from Utah to step aside until the remainder of the Members-elect were sworn in.

Then Mr. Tayler offered this resolution:

Whereas it is charged that Brigham H. Roberts, a Representative-elect to the Fifty-sixth Congress from the State of Utah, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of this House, on his responsibility as such Member and on the basis, as he asserts, of public records, affidavits, and papers evidencing such ineligibility:

Resolved, That the question of the prima facie right of Brigham H. Roberts to be sworn in as a Rep-

¹First session Fifty-sixth Congress, Record, p. 5; Journal, p. 6.

representative from the State of Utah in the Fifty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right the said Brigham H. Roberts shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath in relation to the subject-matter of this resolution.

By unanimous consent the consideration of the resolution was postponed until after the organization of the House had been completed and the President's message had been received and read.¹

On December 5,² the resolution being considered, Mr. James D. Richardson, of Tennessee, offered the following amendment in the nature of a substitute:

Whereas Brigham H. Roberts, from the State of Utah, has presented a certificate of election in due and proper form as a Representative from said State: Therefore, be it

Resolved, That without expressing any opinion as to the right or propriety of his retaining his seat in advance of any proper investigation thereof, the said Brigham H. Roberts is entitled to be sworn in as a Member of this House upon his prima facie case.

Resolved further, That when sworn in his credentials and all the papers in relation to his right to retain his seat be referred to the Committee on the Judiciary, with instructions to report thereon at the earliest practicable moment.

During the debate Mr. Roberts, by unanimous consent, addressed the House.

On a division the amendment was disagreed to—59 ayes, 247 noes. The resolution was then agreed to—304 yeas, 32 nays.

The Speaker appointed the following special committee: Robert W. Tayler, of Ohio; Charles B. Landis, of Indiana; Page Morris, of Minnesota; R. H. Freer, of West Virginia; Charles E. Littlefield, of Maine; Smith McPherson, of Iowa; David A. DeArmond, of Missouri; Samuel W.T. Lanham, of Texas; Robert W. Miers, of Indiana.

The committee reported³ on January 20, 1900, the majority holding that Mr. Roberts ought not to have a seat in the House and declaring his seat vacant. As to the prima facie right the committee say:

Upon this question little need be said except what is hereafter said in relation to the final right to a seat. The questions are inextricably interwoven, and for convenience the main body of authority against his prima facie right to be sworn in is presented in the argument made against his final right to a seat.

Both Houses of Congress have in innumerable instances exercised the right to stop a Member-elect at the threshold and refuse to permit him to be sworn in until an investigation had been made as to his right to a seat. In some cases the final right was accorded the claimant; in many cases it was denied.

This question, as we view it, is always to be answered from the standpoint of expediency and propriety. The inherent right exists of necessity. The danger of disorder and of blocking the way to an organization vanishes in view of the proper procedure. The most strenuous objection is made by those who imagine, for instance, that if the person whose name was first called should be objected to, he might refuse to stand aside until the remaining Members were sworn in. The claim is made that this must inevitably result in confusion and demoralization, and in furnishing an opportunity for an arbitrary and unjust exercise of power on the part of the House.

¹ Mr. Roberts did not vote on the roll call which occurred after this action took place. His name was stricken from the roll and not again called.

² First session Fifty-sixth Congress, Record, pp. 38–53; Journal, p. 34.

³ House Report No. 85, first session Fifty-sixth Congress.

The answer to this is that every person holding a certificate, whose name is on the Clerk's roll, where it is placed by operation of law, is entitled to participate in the organization of the House, whether sworn in or not. Such is the effect and the only effect of the certificate. If the Members-elect, other than the person objected to, desire so to do they can prevent his being sworn in. This lodges no more power in the majority, however arbitrary it may be, than that majority always has, whether on the day of the organization or a week or a month thereafter.

The fear that injustice maybe done by it in time of great party excitement is not justly grounded in theory, nor has it occurred in practice; while on the other hand injustice has often occurred in the unseating of Members in case of contested elections. It is always, whether at the threshold or after the House is fully organized, a question of the power of the majority. It is no more dangerous or disorganizing in the one instance than in the other. There can be no injustice done when every man holding a certificate, whether sworn in or not, is entitled to vote for a Speaker and upon the right of every other Member-elect to be sworn in.

If, by way of illustration, Mr. Roberts had been the first person whose name was called, and he had objected to standing aside, the House, for the purpose of organization, and for the purpose of voting upon the question as to whether he should then be sworn in, would be completely organized, and every other Member present, although not one of them had been sworn in, would be entitled to vote upon that question. This, it seems to us, dissolves every imagined difficulty and permits the easy organization of the House.

If every individual Member had been objected to, *seriatim*, the only objectionable result would have been the inconvenience and delay involved in the time necessary to vote upon all the cases.

Judge McCrary's statement (sections 283 and 284 in his work on Elections) is a sound and correct declaration of the law applicable to the right of the House to compel a Member who is objected to to stand aside, and not permit him to be sworn in until his case is investigated. It is as follows:

"If a specific and apparently well-grounded allegation be presented to the House of Representatives of the United States that a person holding a certificate of election is not a citizen of the United States, or is not of the requisite age, or is for any other cause ineligible, the House will defer action upon the question of swearing in such person until there can be an investigation into the truth of such allegations.

"It is necessary, however, that such allegations should be made by a responsible party. It is usually made, or vouched for, at least, by some Member or Member-elect of the House. It is to be presented at the earliest possible moment after the meeting of the House for organization, and generally at the time that the person objected to presents himself to be sworn in. The person objected to upon such grounds as these is not sworn in with the other Members, but stands aside for the time being, and the House, through its committee, will with all possible speed proceed to inquire into the facts.

"The certificate of election does not ordinarily, if ever, cover the grounds of the due qualifications of the person holding it. It may be said that by declaring the person duly elected the certificate by implication avers that he was qualified to be elected and to hold the office. But it is well known that canvassing officers do not in fact inquire as to the qualifications of persons voted for; they certify what appears upon the face of the returns and nothing more."

This is not quoted as being authoritative in itself, but because it is an exact statement of what the precedents and authorities on that subject clearly disclose.

The minority of the committee, Messrs. Littlefield and De Axmond, filed views in opposition, holding that Mr. Roberts had the constitutional right to take the oath of office and be admitted to his seat on his *prima facie* right.¹

475. The case of Brigham H. Roberts, continued.

In the investigation of the qualifications of Brigham H. Roberts, the committee permitted his presence and suggestions during discussion of the plan and scope of the inquiry.

Witnesses were examined under oath and in the presence of Brigham H. Roberts during the committee's investigation of his qualifications.

¹House Report No. 85, Part II, first session Fifty-sixth Congress, p. 53-77.

In considering the qualifications of Brigham H. Roberts the committee tendered to him the opportunity to testify in his own behalf.

The committee also state in regard to the method of procedure:

The committee met shortly after its appointment, and in Mr. Roberts's presence discussed the plan and scope of its inquiry. Mr. Roberts submitted certain motions and supported them by argument, questioning the jurisdiction of the committee and its right to report against his prima facie right to a seat in the House of Representatives. The determination of these questions was postponed by the committee, to be taken up in the general consideration of the case.

Subsequently certain witnesses appeared before the committee and were examined under oath, in the presence of Mr. Roberts and by him cross-examined, relating to the charge that he was a polygamist. This testimony has been printed and is at the disposal of the Members of the House.

The committee fully heard Mr. Roberts and gave him opportunity to testify if he so desired, which he declared he did not wish to do.¹

476. The case of Brigham H. Roberts, continued.

In a sustained report in 1900 the majority of the committee favored the exclusion and not the expulsion of a Member-elect admitted to be engaged in practice of polygamy.

Discussion of the power of expulsion under the Constitution.

May the House expel a Member-elect before he is sworn in?

Preliminary to the discussion the committee agreed unanimously on the following finding of facts:

We find that Brigham H. Roberts was elected as a Representative to the Fifty-sixth Congress from the State of Utah and was at the date of his election above the age of 25 years; that he had been for more than seven years a naturalized citizen of the United States and was an inhabitant of the State of Utah.

We further find that about 1878 he married Louisa Smith, his first and lawful wife, with whom he has ever since lived as such, and who since their marriage has borne him six children.

That about 1885 he married as his plural wife Celia Dibble, with whom he has ever since lived as such, and who since such marriage has borne him six children, of whom the last were twins, born August 11, 1897.

That some years after his said marriage to Celia Dibble he contracted another plural marriage with Margaret C. Shipp, with whom he has ever since lived in the habit and repute of marriage. Your committee is unable to fix the exact date of this marriage. It does not appear that he held her out as his wife before January, 1897, or that she before that date held him out as her husband, or that before that date they were reputed to be husband and wife.

That these facts were generally known in Utah, publicly charged against him during his campaign for election, and were not denied by him.

That the testimony bearing on these facts was taken in the presence of Mr. Roberts, and that he fully cross-examined the witnesses, but declined to place himself upon the witness stand.

The examination of the law and the precedents applicable to the facts stated above involved an examination of several subjects:

1. As to whether the proper remedy should be exclusion or expulsion.

The majority of the committee held:

The objection is made to the refusal to admit Mr. Roberts that the Constitution excludes the idea that any objection can be made to his coming in if he is 25 years of age, has been seven years a citizen of the United States, and was an inhabitant of Utah when elected, no matter how odious or treasonable or criminal may have been his life and practices.

¹ The meetings of the committee during this examination were open and not secret.

To this we reply:

1. That the language of the constitutional provision, the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime.

2. That the overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator on the Constitution specifically denies it. Especial reference is made to the works of Messrs. Cushing, Pomeroy, Throop, Burgess, and Miller.

3. The courts of several of the States, in construing analogous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a Member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force for twenty years, and thousands of Members of Congress were compelled to take the oath it required.

7. The House in 1869 adopted a general rule of order, providing that no person should be sworn in as a Member against whom the objection was made that he was not entitled to take the test oath, and if upon investigation such fact appeared, he was to be permanently debarred from entrance.

The interesting proposition is made that the claimant be sworn in and then turned out. Upon the theory that the purpose is to permanently part company with Mr. Roberts, this is a dubious proceeding. Such action requires the vote of two-thirds of the Members. We ask if such a vote is possible or right, in view of the following observations.

The expulsion clause of the Constitution is as follows:

"Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member."

No lawyer can read that provision without raising in his own mind the question whether the House has any power to expel, except for some cause relating to the context. The ablest lawyers, from the beginning of the Republic, have so insisted and their reasoning has been so cogent that these propositions are established, namely:

1. Neither House of Congress has ever expelled a Member for acts unrelated to him as a Member or inconsistent with his public trust and duty as such.

2. Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the Member as such, or because it was committed prior to his election.

The majority then proceed to quote and comment on the cases of Humphrey Marshall, John Smith, and William N. Roach in the Senate; and those of O. B. Matteson, Oakes Ames, James Brooks, George Q. Cannon, Schumacher King in the House.

After commenting on the bearing of these cases, the majority continue:

If there is any fact apparent in this case it is that the constituents of Mr. Roberts knew all about him before his election.

Can there be room to doubt the proper action of the House? Is it prepared to yield up this salutary power of exclusion? Will it declare itself defenseless and ridiculous?

Nor are those who assert that expulsion is the remedy necessarily barred from voting for the resolution declaring the seat vacant. He must, indeed, be technical and narrow in his construction of the Constitution who will not admit that if a vote to declare the seat vacant is sustained by a two-thirds majority the Constitution is substantially complied with. He may not agree with the committee that a mere majority can exclude, but he can reserve the right to make the point of order that the resolution is not carried if two-thirds do not vote for it.

Recurring again in their report to the right to expel, the majority say:

Upon this alternative proposition that the proper method of procedure is to permit the claimant to be sworn in, and then, if a two-thirds vote can be obtained to expel him, we desire to call attention first of all to what Story says on that subject, section 837:

"The next clause is, 'Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.' No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules. And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence of clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common but as an ultimate redress for the grievance."

And again, section 838:

"What must be the disorderly behavior which the House may punish, and what punishment other than expulsion may be inflicted, do not appear to have been settled by any authoritative adjudication of either House of Congress. A learned commentator supposed that Members can only be punished for misbehavior committed during the session of Congress, either within or without the walls of the House, though he is also of opinion that expulsion may be inflicted for criminal conduct committed in any place."

And after a reference to the Blount case Story says:

"It seems, therefore, to be settled by the Senate upon full deliberation that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator."

On the subject of expulsion, Rawle says, second edition, page 48:

"Both the Senate and the House of Representatives possess the usual power to judge of the elections and qualifications of their own Members, to punish them for disorderly behavior, which may be carried to the extent of expulsion, provided two-thirds concur. It had not been yet precisely settled what must be the disorderly behavior to incur the punishment, nor what kind of punishment is to be inflicted. * * *"

Paschal on the Constitution, page 87:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member."

We do not need to call particular attention to the phraseology of the constitutional provision, nor do we think it very important to consider the evolution, from the standpoint of punctuation, through which that provision went in the constitutional convention. It now appears as following in the same sentence as the provision for disorderly behavior, with only the rhetorical separation of a comma from it.

It thus appears that the language of the provision for expulsion, in the view of the ablest commentators, furnishes clear and cogent reasons for its construction, and that neither House ought to expel for any cause unrelated to the trust or duty of a Member.

This has been the uniform practice of both Houses of Congress.

The case of *Hiss v. Bartlett* (3 Gray, 468) is cited as showing the unlimited power of a legislative body to expel.

A casual reading of this case, which a careful reading confirms, will show that it directly sustains the position of the majority.

As there was no constitutional provision in Massachusetts respecting expulsion, the legislature of that State was, of course, clothed with all the powers incident to expulsion which are inherent in a legislative body whose powers are not limited by a constitution.

In addition to that, Hiss was expelled on the ground that his "conduct on a visit to Lowell, as one of a committee of the House, was highly improper and disgraceful, both to himself and to the House of which he was a member."

Everything said by the court had relation to such a state of facts. The case is one of expulsion for gross misconduct as a member and in the performance of his duty as a member.

Neither House has ever expelled a Member for any cause unrelated to the trust or duty of a Member.

Both Houses have refused to expel where the proof of guilt was clear, but where the offense charged was unrelated to the trust or duty of a Member.

Again the majority review the precedents in the House and Senate, including the case of Herbert in the Thirty-fourth Congress.

The minority views, after discussing the cases of Matteson in the House and Smith in the Senate, say:

The Matteson case was in 1858. With the exception of a suggestion that a case had been decided in Massachusetts, the purport of which was not stated, no reference was made to a leading Massachusetts case. The opinion of the court in that case, an authoritative construction of the clause of the constitution under which they were acting, was written by Chief Justice Shaw, conceded to be one of the greatest judges that ever sat in any court in any land at any time. The report containing it was published in 1857. It is the only case which we have been able to find where the court has had occasion, with authority, to determine this precise question. The constitution of Massachusetts contained no provision authorizing the expulsion of a Member of the House of Representatives. Joseph Hiss was expelled by the House upon the ground that his conduct on a committee at Lowell "was highly improper and disgraceful, both to himself and to this body of which he is a member." This was not disorderly conduct in the House, and it is significant that the facts that made it "improper and disgraceful" were not disclosed by the case.

Hiss, after his expulsion, was arrested at the instance of one of his creditors on mesne process and committed to jail. He brought a petition for habeas corpus on the ground that he was a member of the House of Representatives, and as such privileged from arrest. This raised the precise question of the legality of his expulsion, and speaking through Chief Justice Shaw, the court, among other things, said:

"The question is whether the House of Representatives have the power to expel a member."

After adverting to the fact that the constitution did not in terms authorize expulsion, he says:

"There is nothing to show that the framers of the constitution intended to withhold this power. It may have been given expressly in other States, either ex majori cautela, or for the purpose of limiting it, by requiring a vote of more than a majority."

In the Constitution of the United States it was given evidently "for the purpose of limiting it," as a two-thirds vote is required.

Again:

"The power of expulsion is a necessary and incidental power, to enable the House to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A Member may be physically, mentally, or morally, wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent and disorderly, or in the habit of using profane, obscene, and abusive language. It is necessary to put extreme cases to test a principle.

"If the power exists, the House must necessarily be the sole judge of the exigency which may justify and require its exercise."

After having fully examined the law and practice of Parliament, he says:

"But there is another consideration, which seems to render it proper to look into the law and practice of Parliament to some extent. I am strongly inclined to believe, as above intimated, that the power to commit and to expel its Members was not given to the House and Senate, respectively, because it was regarded as inherent, incidental, and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair rather than strengthen it. This being so, the practice and usage of other legislative bodies exercising the same functions under similar exigencies and the reason and grounds, existing in the nature of things, upon which the inrules and practice have been founded, may serve as an example and as some guide to the adoption of good rules, when the exigencies arise under our Constitution.

"But independently of parliamentary custom and usages, our legislative Houses have the power to protect themselves, by the punishment and expulsion of a Member.

“It is urged that this court will inquire whether the petitioner has been tried. But if the House have jurisdiction for any cause to expel, and a court of justice finds that they have in fact expelled—,”

He then held that their action was conclusive, and dismissed the petition. (*Hiss v. Bartlett*, 3 Gray, 468.)

It is instructive on this point to note that this paragraph of the Constitution, as originally drawn, read:

“Each House may determine the rules of its proceedings; may punish its Members for disorderly behavior; and may expel a Member;” making three distinct clauses separated by semicolons.

This extract from the records of the debates in the Federal Convention shows clearly why the two-thirds provision was inserted in the expulsion clause:

“Mr. Madison observed that the right of expulsion (art. 6, sec. 6) was too important to be exercised by a bare majority of a quorum; and, in emergencies of faction, might be dangerously abused. He moved that” with the concurrence of two-thirds,” might be inserted between “may” and “expel.”

“Mr. Randolph and Mr. Mason approved the idea.

“Mr. Gouverneur Morris. This power may be safely trusted to a majority. A few men, from factious motives, may keep in a Member who ought to be expelled.

“Mr. Carroll thought that the concurrence of two-thirds, at least, ought to be required.

“On the question requiring two-thirds, in cases of expelling a Member, ten States were in the affirmative; Pennsylvania divided.”

Article 6, sec. 6, as thus amended, was then agreed to, *nem con.* (Madison Papers, Vol. V, p. 406.)

While we think this Hiss case establishes beyond successful controversy the power of expulsion as discretionary and unlimited, it is proper to note that no decided case or elementary writer militates against it. We give all that we have found on the question.

In discussing this question the court, in *State v. Jersey City* (25 N. J. L., 539), said:

“The power vested in the two Houses of Congress by the Constitution, article 1, section 5, paragraph 2, is in different phraseology; it is, that “each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.” Under this power, the Senate in 1797 expelled a Member of that body for an offense not committed in his official character as a Member, nor during a session of Congress, nor while the Member was at the seat of government. (Blount’s case, Story’s Commentaries on the Constitution, ch. 12, sec. 836.) But it is not clear that the power to expel is limited by the Constitution to the cause of disorderly behavior.

Evidently without having in mind the accurate use of the term “qualification” as used in the Constitution, the court, in *State ex rel. v. Gilmore* (20 Kansas, 554), said:

“The Constitution declares (art. 2, sec. 8) that ‘Each House shall be judge of the elections, returns, and qualifications of its own Members.’ This is a grant of power, and constitutes each House the ultimate tribunal as to the qualifications of its own Members. The two Houses acting conjointly do not decide. Each House acts for itself and by itself, and from its decision there is no appeal, not even to the two Houses. And this power is not exhausted when once it has been exercised and a Member admitted to his seat. It is a continuous power and runs through the entire term. At any time and at all times during the term of office each House is empowered to pass upon the present qualifications of its own Members.”

Story says:

“And as a Member might be so lost to all sense of dignity and duty as to disgrace the House by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamor, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary and at the [same] time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot or to aid a corrupt measure; and it has, therefore, been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the Members to justify an expulsion. * * *

“In July, 1797, ‘William Blount was expelled from the Senate for’ a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator.’ The offense charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British Government among the Indians. It was not a statutable offense, nor was it committed in his official character; nor was it committed during the session of Congress, nor at

the seat of government. Yet, by an almost unanimous vote he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges. It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Senator." (Story on the Constitution, vol. 1, p. 607.)

Paschal states:

"It seems to be settled that a Member may be expelled for any misdemeanor which, though not punishable by any statute, is inconsistent with the trust and duty of a Member. (Blount's Case, 1 Story Const., sec. 838; Smith's Case, 1 Hall's L. J., 459; Brook's Case, for assaulting Senator Sumner in the Senate Chamber, for words spoken in debate.) It extends to all cases where the offense is such, as in the judgment of the House, unfits him for parliamentary duties. (Paschal's Annotated Constitution, p. 87, par. 49.)

"It has not yet been precisely settled what must be the disorderly behavior to incur punishment, nor what kind of punishment is to be inflicted; but it can not be doubted that misbehavior out of the walls of the House or within them, when it is not in session, would fall within the meaning of the Constitution. Expulsion may, however, be founded on criminal conduct committed in any place, and either before or after conviction in a court of law." (Rawle on the Constitution, 2d ed., 47.)

Cooley is specific:

"Each House has also power to punish Members for disorderly behavior, and other contempts of its authority, as well as to expel a Member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the Constitution among those which the two Houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is 'a necessary and incidental power to enable the House to perform its high functions, and it is necessary to the safety of the state. It is a power of protection. A Member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language.' And, 'independently of parliamentary customs and usages, our legislative houses may have the power to protect themselves by the punishment and expulsion of a Member,' and the courts can not inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defense was furnished. (Cooley's Constitutional Limitations, pp. 159, 160.)

"Since there has been repeated occasion to take steps against Members of each House under each of these two clauses, and since the majority has never taken this standpoint, it may now be regarded as finally settled that that interpretation is correct which is the broader and at the same time according to ordinary speech, unquestionably the more natural one. Both Houses of Congress must have been granted every power needed to guard themselves and their Members against any impropriety on the part of a Member, and to preserve their dignity and reputation among the people. It is wholly for them to say what conduct they are to regard as dishonorable enough to require expulsion. An appeal from their decision lies only to the court of public opinion, a court which brings in its verdict at the elections. (Von Holst's Constitutional Law of the United States, 102.)

"The power of expulsion is unlimited, and the judgment of a two-thirds majority is final. (Pomeroy on Constitutional Law, p. 139, 1895.)

"It seems necessary also to remark that a Member may be expelled, or discharged from sitting, as such, which is the same thing in milder terms, for many causes, for which the election could not be declared void. (Cushing, Law and Practice Legislative Assemblies, p. 33, sec. 84.)

"The power to expel a Member is naturally and even necessarily incidental to all aggregate and especially all legislative bodies; which, without such power, could not exist honorably, and fulfill the object of their creation. In England this power is sanctioned by continued usage, which, in part, constitutes the law of Parliament. (Ibid., p. 251, sec. 625.)

"Blount was expelled from the Senate for an offense inconsistent with public duty, but it was not for a statutory offense, nor was it in his official character, nor during the session of Congress, nor at the seat of government; the vote of expulsion was 25 to 1.

"The motion to expel a Member may be for disorderly behavior, or disobedience to the rules of the House in such aggravated form as to show his unfitness longer to remain in the House, and the cases above cited, as well as the reason of the provision, would justify the expulsion of a Member from the House

where his treasonable and criminal misconduct would show his unfitness for the public trust and duty of a Member of either House. But expulsion, which is an extreme punishment, denying to his constituency the right to be represented by him, can only be inflicted by the concurrence of two-thirds of the House, and not by a bare majority only. (Citing Story on the Constitution, see. 837; Tucker on the Constitution, p. 429.)

"It has since been held by the House of Representatives that a Member duly elected could not be disqualified for a cause not named in the Constitution, such as immorality, and that the remedy in such a case, if any, was expulsion. The distinction between the right to refuse admission and the right of expulsion upon the same ground is important, since the former can be done by a majority of a quorum, whereas expulsion requires the vote of two-thirds. The question can not be said to have been authoritatively decided. (Foster on the Constitution, p. 367.)

Mr. Foster's attention does not appear to have been directed to the case of *Hiss v. Bartlett*, as it is in point on his doubt if the doubt relates to the power of expulsion; he does not refer to it.

It is proper to observe that the determinations of the court and the opinions of eminent legal authors, unexcelled in reputation and learning, are entitled upon these propositions to great weight, as they are in every instance the result of careful, dispassionate, and disinterested research and sound reasoning, unaffected by considerations that must necessarily have been involved in legislative precedents. The two-thirds limitation upon the right to expel not only demonstrates the wisdom of the fathers, but illustrates the broad distinction between exclusion and expulsion.

A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose. Hence expulsion has been wisely left in the discretion of the House, and the safety of the Members does not need the protection of legal rules.

It seems to us settled, upon reason and authority, that the power of the House to expel is unlimited, and that the legal propositions involved may be thus fairly summarized: The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a Member-elect lacks some of the qualifications required by the Constitution. The power of expulsion is made by the Constitution purely a matter of discretion, to be exercised by a two-thirds vote, fairly, intelligently, conscientiously, with a due regard to propriety and the honor and integrity of the House, and the rights of the individual Member. For the abuse of this discretion we are responsible only to our constituents, our consciences, and our God.

We believe that Mr. Roberts has the legal, constitutional right to be sworn in as a Member, but the facts are such that we further believe the House, in the exercise of its discretion, is not only justified, but required by every proper consideration involved, to expel him promptly after he becomes a Member.

In the course of the debate, on January 24, 1900, Mr. John F. Lacey raised and discussed the proposition that the House might expel a Member before he was sworn in.¹

477. The case of Brigham H. Roberts, continued.

In the case of Brigham H. Roberts, the House assumed its right to impose a qualification not specified by the Constitution; and excluded him.

2. As to the qualifications of a Member under the Constitution.

The majority of the committee held that the clause of the Constitution specifying the qualifications of a Member did not preclude the imposition of other disqualifications by the Congress or by either House, arguing thus:

This question meets us at the threshold: Does the constitutional provision, "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen," preclude the imposition of any disqualification by Congress or by either House?

¹ Record, p. 1135.

Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age, and who has been for seven years a citizen of the United States, and was, when elected, an inhabitant of that State in which he was chosen, is eligible to be a Member of the House of Representatives and must be admitted thereto, even though he be insane, or disloyal, or a leper, or a criminal?

Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of government revolts against any such conception.

Not now discussing the question as to whether or not that constitutional provision is exclusive, so far as ordinary qualifications are concerned, is it to be said that there is in it no implied power of disqualification for reasons which appeal to the common judgment of mankind, and which are vital and essential to the very constitution and integrity of the legislative body as such?

We are compelled to answer that that provision, in the sense to which we have just adverted, is not exclusive, and that reasonable disqualifications may attach to certain individuals, which may, for the sake of argument, be assumed to amount in practice to added qualifications.

A marked distinction is to be made between arbitrary disqualifications and those which arise out of the voluntary act of the individual who places himself, by the commission of an offense against the law or civilization, within the prohibited class. We believe, whatever general statements may have been made by public men, that no commentator on the Constitution, no court, or either House of Congress has ever questioned the propriety of that distinction, but that the contrary doctrine has been universally held wherever the question was clearly raised.

In our opinion it is demonstrable that no such exclusive meaning can be given to the provision above quoted as is contended for on the other side of this proposition, and that the sound rule is declared by Burgess in his work on Political Science and Constitutional Law, when on page 52, he says:

"I think it certain that either House [of Congress] might reject an insane person * * * or might exclude a grossly immoral person."

We desire at the very threshold of this discussion to lay down these general propositions, never to be forgotten and always to be kept clearly in mind:

First. That the House has never denied that it had the right to refuse to permit a Member-elect to be sworn in, although he had all of the three constitutional qualifications.

Second. That it has in many instances affirmatively declared that it had the right to thus refuse.

Third. That the right to so refuse is supported on principle and by the overwhelming weight of authority of constitutional writers and judicial opinions on analogous constitutional questions; and

After reviewing the status of Roberts the majority continue:

We assert that it is our duty, as it is our right, to exclude him; to prevent his taking the oath and participating in the councils of the nation.

Three methods present themselves by which to test the soundness of this view:

First. On principle, and this involves—

- (1) The nature of the legislative assembly and the power necessarily arising therefrom;
- (2) The express language of the constitutional provision;
- (3) The reasons for that language;
- (4) Its context and its relation to other parts of the instrument;
- (5) The obvious construction of other portions of the same instrument necessarily subject to the same rule of construction.

Second. The text-books and the judicial authorities.

Third. Congressional precedents. These are of two classes—

- (1) Action respecting the rights of individual Members;
- (2) Acts of Congress and general resolutions of either House.

FIRST.—*On principle.*

As to the first proposition, what is the argument on principle? We think it will be undoubted that every legislative body has unlimited control over its own methods of organization and the qualifications or disqualifications of its members, except as specifically limited by the organic law. We do not think that this proposition needs amplifying; it is axiomatic. It is apparent that every deliberative and legislative body must have supreme control over its own membership, except in so far as it may be

specifically limited by a higher law; there is a distinction to be drawn between the legislative power of a legislative body and its organizing power, or those things which relate to its membership and its control over the methods of performing its allotted work. That is to be distinguished from the legislative power to be expressed in its final results.

When our Constitution was framed there was practically no limit to the right and power, in these respects, of the English Parliament. Such power is necessary to the preservation of the body itself and to the dignity of its character. In England it was at one time admissible to permit the admission into the House of Commons of minors, of aliens, and of persons not inhabitants of the political subdivision in which they were elected. To this day it is well known that an inhabitant of London may be elected by a Scotch constituency, and a member has been elected by more than one constituency to the same Parliament.

The framers of the Constitution, familiar with these facts, proposed to prevent their happening in this country. They knew also that a similar latitude of choice had been exercised in the original colonies and in the States of the Federation, and it was proposed to put a stop to it so far as Congress was concerned. A very luminous argument was made on this subject by John Randolph in the House of Representatives in 1807.

We quote as follows from his remarks:

"If the Constitution had meant (as was contended) to have settled the qualifications of Members, its words would have naturally run thus: 'Every person who has attained the age of twenty-five years and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives.' But so far from fixing the qualifications of Members of that House, the Constitution merely enumerated a few disqualifications within which the States were left to act."

"It is said to the States, 'You have been in the habit of electing young men barely of age. You shall send us none but such as are five and twenty. Some of you have elected persons just naturalized. You shall not elect any to this House who have not been some seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority. You shall elect none whom your laws do not consider as inhabitants.'"

In pursuance of the idea in the mind of the framers of the Constitution, we have the peculiar words "no person shall be a Representative who shall not have attained, etc." How happy indeed are these words if we give them precisely the force and meaning for which we contend. How unhappy and how misleading, how impossible, in fact, to the masters of the English language who wrote them, if they were intended to exclude all other possible requirements or disqualifications. We might admit such construction if suitable language was difficult to find or frame; but note how easily such a purpose could have been served in fewer words and with unmistakable meaning. Thus: "Any person," or "a person," or "every person, may be a Representative who shall have attained the age of twenty-five years," etc.

The provision seems to be worded designedly in the negative so as to prevent the suspicion that it was intended to be exclusive, and so as to prevent the application of the rule, "the expression of one thing is the exclusion of another." The immediately preceding clause is affirmative, and says: "The electors in each State shall have the qualifications," etc. With some show of propriety it can be claimed that this provision is exclusive. It at least does not have the negative form to condemn such construction.

Story says (Constitution, sec. 448):

"The truth is, that in order to ascertain how far an affirmative or negative proposition excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt that an affirmative grant of powers in many cases will imply an exclusion of all others."

It is a notable fact that in the first draft of this constitutional provision which provides for qualifications of Representatives in Congress the language was affirmative and positive and that when it was finally presented for adoption it appeared in the form in which we now find it.

The slight contemporaneous discussion in the constitutional convention was upon the provision in the affirmative form. Why was it changed in the negative? Surely not for the sake of euphony, and certainly not to make it more explicitly exclusive.

In the report of the committee of detail, submitting the first draft of the Constitution, this section read in the affirmative and as follows:

"Every Member of the House of Representatives shall be of the age of 25 years at least; shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

In the discussion Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions."

Mr. Wilson took the same view, saying:

"Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters."

The next day after this discussion, and when the clause respecting age, etc., had, in its general sense, been informally approved, a proposed section respecting a property qualification was discussed. Mr. Wilson said (Madison Papers, vol. 5, p. 404) that he thought "it would be best, on the whole, to let the section go out; this particular power would constructively exclude every other power of regulating qualifications." What did Mr. Wilson mean if the result of the discussion in which he participated on the preceding day was to "constructively exclude every other power of regulating qualifications?"

In view of the objections urged by Dickinson and Wilson and their opinions as to the construction that would result and the consequences thereof, the conclusion seems reasonable, if not absolutely irresistible, that the change from the affirmative to the negative form was intentionally made and with the very purpose of obviating such objections, and hence that in being negatively stated it was considered by the convention that the particular qualifications mentioned would not be exclusive and would not render impossible the "disqualifying odious and dangerous characters" and would not prevent "supplying omissions."

This section was finally reported and adopted in the negative form in which it now appears. The report of the committee seems to have been elaborately discussed.

Where do we find ourselves in such a case as this? Suppose that Brigham H. Roberts, instead of being charged with polygamy, was charged with treason, not constructive treason, but actual treason, and suppose that a witness appeared before the committee—a credible witness, whose testimony was undisputed—who testified that he had seen Brigham H. Roberts wage war against the United States in the Spanish war, giving aid and comfort to Spain, not constructively, but actively; and suppose that Roberts appeared himself before the committee and said, "All that this man says is true; I did wage war against the United States; I did give aid and comfort to its enemies in time of war against a foreign foe, and I glory in it." Now, in that state of facts the law could not lay its hand upon him for the crime treason, for the Constitution provides that no person shall be convicted of treason except upon the testimony of two witnesses to the same over fact or by confession in open court. So that under the state of facts thus presented he could not be convicted of treason.

Suppose he was here with a certificate of election from a great State and demanded admission. Upon the theory of the other side we must admit him. The minority insist that in such a case he must be sworn in. It will not do to say that practically no wrong would be done on the ground or on the theory that he might be immediately thereafter expelled, for he would have a right to be heard in his own defense, he would have a right to be heard as to whether the House had a right upon those facts to expel, and it might take much time. In any event he would be there fully armed with all of the powers and privileges of a Member of the American House of Representatives. We think that the civilized world would declare that it made itself ridiculous if it confessed its want of power to keep out from the councils of the nation a man who was a confessed traitor.

Another illustration. Suppose that on the 1st day of January, 1899, two months after his election and two months before his term as a Representative should commence, he had been convicted of the crime of bigamy or of adultery, either one of which is a felony under the statutes of Utah, for an offense, we will presume, committed prior to his election, so that it can not be charged that after his election he voluntarily put himself in that position, and he was tried, convicted, and sentenced to the penitentiary for a term of two years; and it so occurs that his term of imprisonment should expire on the 3d day of March, 1901, the day before his term as Representative in Congress expires. Suppose he presented himself on the 3d day of March, 1901, no action having been previously taken in his case, would the House have to admit him, or would not the proper proceeding be, while he was still in the penitentiary, for such

an offense, for the House to declare his seat vacant; that he ought not to have or retain a seat in the American House of Representatives?

It may be said that that imprisonment would amount to a constructive resignation. There is no precedent for that. The Yell case is entirely different. An election was held for a successor to Yell, and the seat was recognized to be vacant upon the express ground that he had taken another office incompatible with his position as a member of Congress, and that since he was occupying and exercising the functions of that office, of course that vacated ipso facto his position as Representative in Congress.

It is well settled that while the mere appointment or election to an office the duties of which are incompatible with those of one already held will not vacate such an office, the acceptance of the incompatible office ipso facto vacates the first office held. This doctrine is laid down in Willcox, in Angel and Ames on Corporation, section 434; in Whitney against Canique, 2 Hill, 93; Cushing's Law on Practice of Legislative Assemblies, section 479, and many other authorities.

Let us assume, further, that that sentence of imprisonment would not expire until after the 4th of March, 1901, so that during all of that period Roberts would be incapacitated from being present to demand the right to be sworn in; what is the remedy? We think it clear that the seat is not vacated by the mere fact that he does not present himself; by the mere fact that he remains absent. A man might be sick, and he might remain away the entire session, hoping that he might become well enough to attend, and Roberts might indulge the hope that he would be pardoned, and thus get in. Is it to be said that the House on that state of facts can not declare the seat vacant and permit the governor to issue a new writ and call another election? If it can not, then we are face to face with the proposition that the people of the State must remain unrepresented during the entire term of Congress.

Suppose another case. That in the midst of the organization, and before being sworn in, a Member-elect should so indecently and outrageously conduct himself before the eyes of the House and the assembled multitude as to demand and justify expulsion if he had so conducted himself after he had been sworn in. What would the House do? In the midst of his outrageous misconduct must the House, with tender persuasiveness, beg him to honor it by being sworn in so that he may be turned out, or would it refuse to swear him in and proceed to declare his seat vacant? Could the strictest constructionist of the Constitution deny that the Constitution was substantially complied with if he was excluded by a two-thirds vote, even if he did not assent to our view in all respects.

Suppose that the claimant to this seat, while enjoying through the courtesy of the House the privilege of the floor, should declare his contempt for this body and for the Government; that he respected none of its decrees or the laws of the land as having any binding force upon him; that if he became a Member of the House he should become so merely for the purpose of obstructing its business and to tear down the Government. What would the House do? Swear him in that it might have the ineffable privilege of turning him out? Or would it declare him unfit to have a seat in that body and declare his seat vacant?

As Judge Shaw says in *Hiss v. Bartlett* (3 Gray, 473), "it is necessary to put extreme cases to test a principle."

So much for illustrations upon that question. Look, now, at the last paragraph of Article VI of the Constitution:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution."

Here is an affirmative declaration that a certain oath shall be administered to certain officials. If the theory of exclusion is applied to the qualification clause as to Representatives, it must be applied to this clause, and therefore Congress has no power to demand any other oath, or superadd to this oath any other provisions.

And yet the very oath we took as Members of this House has additional provisions. Congress passed also the test oath act in 1862, making vital additions to the constitutional oath, and, indeed, adding a new ground of disqualification for Members of Congress. This act was passed by a large majority and compelled Members of Congress to submit to that oath for many years. Chief Justice Marshall, the great expounder of the Constitution, in the case of *McCulloch v. Maryland*, declared that "He would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath or oaths as its wisdom might suggest," and the whole opinion in that case is addressed in principle to the very doctrine that is here advocated.

If Congress could add to the constitutional oath, the same theory of construction must permit it to at least add reasonable qualifications to the requirements for members of the legislative body, at least to the extent of declaring disqualifications which in their nature ought to bar a man from entrance into a great legislative body,

The same clause to which we have just referred has this provision:

"But no religious test shall ever be required as a qualification to any office or public trust under the United States."

If the Constitution had laid down all the qualifications which Congress or any other power had the right to impose it was unnecessary to go on and declare that no religious test should be required. That great instrument is inconsistent in its parts and contradictory of itself if it be true that it meant that no disqualifications should be provided except those named. Nor was it necessary, if the proviso means an oath merely, that such exception should be made, for the preceding words of the paragraph set out the required oath.

The effort to make the negative declaration of minimum qualifications exclusive of all others, whatever the necessities of the House may be, falls to the ground if we admit that the paragraph respecting oaths is in the same instrument as that which defines the qualifications of Members of Congress.

SECOND.—*The text-books.*

Let us now proceed with what we have called the text-book and judicial authority.

There is a statement in Story's work on the Constitution to the effect that the clause in the Constitution describing the qualifications for Representatives in Congress would seem to imply that other qualifications could not be added.

Now, whether or not that be sound, these two observations are to be made upon it:

First. That it is dismissed in a very few words. Justice Story himself disclaims explicitly in his work that he gives his own opinion as to what the Constitution means, but asserts that he undertakes merely to give the statements of others.

Second. This statement of Judge Story does not at all interfere with the proposition we have laid down: That the power of the House to exclude from its membership a person who is, for instance, disloyal, a criminal, insane, or infected with a contagious disease is not superadding any qualification, within the meaning of Story, such as a property qualification or an educational qualification.

We find, however, that Story's expression, if it means all that is claimed for it by the minority, does not accord with the opinion of other commentators, with the courts, or with the Congressional precedents. We have already quoted and will not now repeat what is said by Prof. John W. Burgess, professor of history, political science, and international law, and dean of the university of political science in Columbia College, New York. This ambitious work, published in 1896, must be considered an authority on the subject of constitutional law.

In Pomeroy's Constitutional Law, 3d edition, page 138, is the following:

"The power given to the Senate and to the House of Representatives, each to pass upon the validity of the elections of its own Members, and upon their personal qualifications, seems to be unbounded. But I am very strongly of the opinion that the two Houses together, as one House, can not pass any statute containing a general rule by which the qualifications of Members as described in the Constitution are either added to or lessened. Such a statute would not seem to be a judgment of each House upon the qualifications of its own Members, but a judgment upon the qualifications of the Members of the other branch. The power is sufficiently broad as it stands. Indeed, there is absolutely no restraint upon its exercise except the responsibility of the Representatives to their constituents. Under it the House inquires into the validity of the elections, going behind the certificates of the election officers, examining the witnesses, and deciding whether the sitting Member or the contestant received a majority of legal votes. The House has also applied the test of personal loyalty to those claiming to be duly elected Representatives, deeming this one of the qualifications of which it might judge."

Pomeroy is discussing the power of the House, not stating what somebody may have said.

So, also, in the lectures of Justice Miller on the Constitution of the United States, page 194, is the following:

"Very few controversies, if any, have ever arisen in either body (that is, of Congress) concerning the qualifications of its Members. It was at one time a question somewhat mooted whether the States

could add to the qualifications which the Constitution has prescribed for the Members of the Senate or the House of Representatives, but it is now conceded that this must be decided by the Constitution alone, because, though it might be conceivable that Congress might make some conditions or limitations concerning the eligibility of its Members, it has not been done, and the constitutional qualifications alone regulate that subject."

If a profound constitutional authority like Justice Miller had believed that the provision we are considering was absolutely exclusive and prevented the House or the Senate from exerting any such power it seems to us that he would have so declared.

Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

Who shall say that the exclusion of Roberts on the ground of polygamy is "opposed to the spirit of the Constitution?"

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says:

"To the disqualifications of this kind may be added those which may result from the commission of some crime which would render the Member ineligible."

The courts.

What have the courts said on similar propositions? We first have the case of *Barker v. The People* (3d Cowen) [New York]. In that case it was held that every person not specifically disqualified by the Constitution was eligible to election or appointment to office. In so far as that particular statement goes, it is a denial of the broad right to superadd to the constitutional provision as to qualifications. But that statement, as applied to this case, loses all of its applicability, for two reasons:

(1) Because it was not the question that it had to decide.

(2) Because the judge distinctly and positively deduces—and that was the point involved in the case—that notwithstanding that want of power in the legislature to add to the Constitution qualifications it did have the right to disqualify for crime. He proceeds to say that it might disqualify for crime upon conviction thereof. We apprehend that that is unimportant here, for if the House of Representatives has a right to disqualify for crime it has the power and the right to determine for itself whether the crime was committed, and not to depend upon a judicial conviction. The necessity for a judicial conviction is the more apparent where the person who seeks to take office undertakes to assume an executive office to which he has been elected or appointed, for there may not be any other than the ordinarily constituted court in which to try the question of his guilt of the offense that created his ineligibility.

But it is not the settled doctrine of the law that disqualification for crime must be first adjudicated in the courts. The authorities are, the most of them, against that proposition, and for the sake of convenience we shall refer to them here.

We quote from *Royall v. Thomas* (28 Gratton (Va.), 130). The syllabus is as follows:

"Under the constitution and statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by proceeding of quo warranto, or if that writ be not in use, by information in the nature of a quo warranto, though he has not been convicted of the offense in any criminal prosecution against him."

The court in this case say that the principal authority relied on in support of the contrary position to that stated in the syllabus is the Kentucky case of *Commonwealth v. Jones*.

"It was held in that case that the clause of the Kentucky constitution imposing the disqualification for office of the offense of dueling is not self-executing, except so far as it prevents those who can not or will not take the requisite oath from entering upon office. It was there held that a citizen willing to take such oath could not be proceeded against for usurpation of such office until he had been first indicted, tried, and convicted of the disqualifying offense.

"It was found, however [said the Virginia court in the Gratton case], on examination, that much of the reasoning of the court in the Jones case turns upon the peculiar phraseology of the Kentucky constitution, in which it is declared that the offender shall be deprived of the right to hold any office, post, or trust under the authority of the State.

"The court agreed that if, instead of the words shall be deprived' the phrase 'shall not be eligible' had been used, some of the difficulties attending the argument to show that the provision is self-executing would have been obviated.

"In the case of *Cochran v. Jones*, involving the same question, the board for the determination of contested elections arrived at a very different conclusion upon the same clause of the Kentucky constitution. It will thus be seen that even in Kentucky there is such conflict of opinion in respect to the true interpretation of the constitutional provisions in question as deprives the decision relied on by the defendants of the weight of being considered even persuasive authority.

"The provision in the Virginia constitution is as follows: 'No person who, while a citizen of this State, has, since the adoption of this constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a deadly weapon, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution.'"

The court goes on to explicitly hold that previous conviction was unnecessary, arguing it with great force.

The same doctrine is held in *Mason v. The State* (58 Ohio State), where Mason, who had been elected probate judge of a county in Ohio, had expended more money to bring about his election than the corrupt practices act allowed, and as this act disqualified such person from holding the position to which he was elected, the supreme court held that he could be thus disqualified and kept out of office without conviction.

To the same effect is the case of *Commonwealth v. Walter* (83 Pennsylvania State, 105).

Proceeding with the enumeration of authorities as to the exclusive effect of the constitutional provision defining or declaring qualifications for office, the next case to which we call attention is *Rogers v. Buffalo* (123 New York). We quote from page 184:

"The case of *Barker v. The People* (3 Cowan, 686) has been cited by counsel. That case holds the act to suppress dueling, which provided as a punishment for sending a challenge that the person so sending should, on conviction, be disqualified from holding any public office, was constitutional. The chancellor, in the course of his opinion, said he thought it entirely clear that the legislature could not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution had not required. What he meant by such expression is rendered clear by the example he gives. Legislation would be an infringement upon the constitution, he thought, which should enact that all physicians, or all persons of a particular religious sect, should be ineligible to hold office, or that all persons not possessing a certain amount of property should be excluded, or that a member of assembly must be a freeholder, or any such regulation.

"But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualifications not mentioned in the constitution. The 'qualifications' which were in the mind of the learned chancellor were obviously those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus, a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon be arbitrary or unconstitutional as an illegal exclusion from office? I think not.

"The purpose of the statute must be looked at and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the State, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purposes, it would be difficult to say what constitutional provision is violated or wherein its spirit is set at naught."

And, again, on page 188—

"It is said that the legislature had no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the fact that he does possess such qualifications shall be ascertained by a fair, open, and proper examination. Nothing but the bare oath mentioned in the constitution can be asked of any applicant for an appointive office is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense we are quite sure that the framers of our organic law never intended to impose a constitutional

barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means to accomplish such end are appropriate therefor they must be within the legislative power.

"The idea can not be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people."

And, again, on page 190—

"In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our constitution."

This opinion was delivered by Justice Perkham, now a member of the Supreme Court of the United States.

Another instructive case is that of *Ohio ex rel. Attorney-General v. Covington*, 29 Ohio State, page 102. The opinion is by Judge McIlvaine, one of the ablest and most careful judges that ever sat in the supreme court of Ohio. He says:

"The last objection made to the validity of this act is based on section 4 of article 15 of the constitution, which declares: 'No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.'

The question arises under the fourth section of the act (which the court is construing), which provides: 'Each member and officer of the police force shall be a citizen of the United States, and a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language.'

There is no claim made that the qualifications prescribed in the act, in view of the nature of the duties to be performed, are unreasonable, or even unnecessary, to the discharge of the duties. The point made is that disqualifications are imposed by the statute which are not imposed by the constitution.

"It is apparent that this statute is not in conflict with the terms of this constitutional provision. It does not authorize the appointment of a person who is not an elector. The express provision of the constitution is that a person not an elector shall not be elected or appointed to any office in this State. Now, unless the clear implication is that every person who has the qualifications of an elector shall be eligible to any office in this State, there is no conflict between the statute and the constitution. I do not believe that such implication arises. There are many offices the duties of which absolutely require the ability of reading and writing the English language. There are many electors who, from habit of life or otherwise, are wholly unfit to discharge the duties of many offices within this State. If the framers of the constitution had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration. The power under the general grant being ample and certain, a statute should not be declared void because in conflict with an alleged implication, unless such implication be clear and indubitable."

We find the same doctrine in the case of *Darrow v. The People*, 8 Colorado, page 417. The syllabus relating to this question is as follows:

"The statute designating the payment of taxes as a necessary qualification of membership in the board of aldermen is not in conflict with section 6, article 7, of the constitution."

The provision of that section is as follows:

"No person except a qualified elector shall be elected or appointed to any civil or military office in the State."

The court says, on page 420, that it is argued that this provision "by implication inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains

the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form—that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation.

“The right to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence constitute the individual a legal voter; but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office. And certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution by this provision intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other qualifications should be imposed.”

THIRD.—*Legislative precedents.*

We proceed now to the legislative precedents upon this matter of exclusion, without admitting the person objected to to be sworn in.

JEREMIAH LARNED.

One Jeremiah Larned, as long ago as 1785, was elected to the legislature of Massachusetts, but it turned out that he had violated a law that that legislature had passed. And what was it? On election day he headed a riot for the purpose of preventing the collection of taxes. What did the fathers of that day do? They were not men who were regardless of human rights; they held that inasmuch as Larned had violated the law he was unworthy to take a seat upon that floor, and they kept him out.

The majority further cite and discuss the cases of John M. Niles, Philip F. Thomas, and Benjamin Stark in the Senate, and, the Kentucky cases and those of Whittemore and George Q. Cannon in the House. The majority then say:

Thus we see that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and, as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications. There is a large amount of debate, where opinions are given on both sides of the proposition, but as against that is the never-varying action of the two bodies themselves.

* * * * *

Some importance is given by the minority to the final action of the House of Commons in the Wilkes case. We are asked to infer from some remark attributed to Edmund Burke that he had written “finis” to the chapter on exclusions from parliamentary bodies.

As to that, we have to say that after diligent search we find no cases where the House of Commons ever held or decided that it had not the right to exclude at the very threshold a member whose certificate or credentials were perfect and uncontested, although the ground of exclusion was not a want of legal qualifications, and there are scores of cases since 1780 where it has claimed and exercised that right. We have found several cases where the House of Commons has declared that it possessed (and exercised) the right not only to exclude and suspend, but in a few instances to expel, a member for an offense unrelated to the functions of a member of Parliament, which offense was in a few instances committed before his election to Parliament, but was held to be of a continuing character.

The Houses of the American Congress have not accepted or followed these last-named precedents, due undoubtedly to the radical differences between organization, jurisdiction, and powers of the English Parliament and the American Congress. The most striking of these differences, as stated by Mr. Cushing, are that in this country Members of both branches of Congress are elected for specified terms and that the Members of the House of Representatives are apportioned among and elected by their several constituencies—so far as possible—upon the principle of equality; whereas in England the House of Lords is composed of members who are not elected at all, but who sit as members during their lives by virtue of hereditary or conferred right, as the nobility, or temporal lords, or of their appointment to places of

high dignity in the church, as the archbishops and bishops, or lords spiritual; and the members of the House of Commons, though elected, are not apportioned among the several constituencies and elected upon the principle of equality or representation, but chiefly upon the principle of corporate or municipal right, and for no fixed period of time.

Another important difference is that the existence and powers of the House of Commons rest largely on custom and tradition, aided, of late years, by statute provisions, whereas in the House of Representatives (as well as the Senate) these powers are founded in and for a great part regulated, limited, and controlled by a written Constitution and laws.

It may be said that the House of Commons has uniformly taken the view that under the right to judge of the "qualifications" of its members—their legal election and return being conceded—it rests wholly within the discretion of that body to establish a new test or requirement of qualification for membership, and that it may be either mental, such as for imbecility or insanity; physical, as for paralysis; or for grave offenses against criminal laws.

The minority of the committee, arguing that the three qualifications specified in the Constitution are the only ones which may be imposed, say:

The Constitution, article 1, section 5, provides that "each House shall be the judge of the elections returns, and qualifications of its own Members."

As to qualifications of Representatives, it provides:

"No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. (Constitution, article 1, section 2.)"

Is it seriously contended that this House can of its own motion, by its own independent action, create for the purposes of this case a legal qualification or disqualification? This House alone cannot make or unmake the law of the land. Before any one of its acts can become law it must be concurred in by the Senate and approved by the President, or passed by two-thirds of each House over his veto. It is quite clear that the House, by its independent action, can not, if it would, make for this case any disqualifying regulation that would have the force of law.

The qualifications being negatively stated in the Constitution, it is said that Mr. Roberts is ineligible under the provisions of the act of March 22, 1882, section 8, known as the Edmunds law, viz:

"SEC. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

The existence of the disqualification in this act is predicated not upon a conviction of or as a punishment for the offenses of polygamy or unlawful cohabitation, but simply as incident to the existence of those conditions.

It is a very grave question as to whether Congress can, by a law duly enacted, add to the qualifications negatively stated in the Constitution. There is no decision of the United States Supreme Court directly or indirectly construing this provision. There is no decision of any State court directly in point. In *Ohio v. Covington* (29 Ohio Stat., 102), relied upon, the court was passing upon the right of the defendants to hold the offices of police commissioner and member of the board of health for the city of Cincinnati. The constitution provided that—

"No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector."

The court distinctly held that "the defendants, as members of the board of police commissioners * * * are officers for whose election and appointment no provision is made in the Constitution of the State or of the United States," and were therefore such as the legislature had, by the express provisions of the Constitution, authority to create. When the legislature created the offices in question, it attached to them the condition that each officer should be "a resident citizen for three years of the city in which he shall be appointed, and able to read and write the English language."

The offices in question were creatures of the statute, and not of the constitution. It is familiar law that whatever office the legislature creates it can create with such conditions, limitations, qualifications,

and restrictions as it sees fit to impose; and this was all that it was necessary for the court to say in that case in upholding the validity of the statute. It is true that it did go further than that, further than the case required, and held that no implication arose, from the negative language of the constitution, that other qualifications could not be added by the legislature. In so far, however, as the opinion goes beyond the requirements of the case, it certainly is doubtful authority. It should be stated that this case has been fully approved in the recent case of *Mason v. State* (58 Ohio St., 54).

The case of *Darrow v. People* (8 Colo., 420), relied on, is also subject to the same criticism as *State v. Covington*, as the office there considered was that of alderman, the creature of the statute.

The case of *People v. May* (3 Mich., 598) is relied upon to support the proposition that statutory additions may be made to the constitutional qualifications. We submit that so far as that case is an authority it is directly in point against the contention. In that case a layman had been elected to an office designated in the constitution as "a prosecuting attorney." The question was whether any person not a lawyer was eligible to the office. It was objected that to hold that eligibility was confined to the legal profession would be adding a qualification in violation of the constitution.

The court held that they must give to the words "a prosecuting attorney" such a construction as would be consistent with the sense in which they were used, and that the obvious intention of the constitution was that the office should be held by an attorney at law. Certainly not a very violent inference. This did not add a qualification; merely held that one already existed. But the court did not stop there, or leave their position as to the right to add qualifications open to doubt, as they emphatically said:

"We concede to the fullest extent that it is not in the power of the judiciary or even the legislature, to establish arbitrary exclusions from office, or annex qualifications thereto, when the Constitution has not established such exclusions, nor annexed such qualifications. But it is begging the question to assume that the act of construing the Constitution has that effect." (610.)

It is not perceived how this case gives any aid or comfort to those who promote the contention adverted to.

The remark of the court in *McCulloch v. Maryland* (4 Wheaton, 416), purely a dictum made by way of illustration, when discussing the powers reasonably to be implied from the concise and general provisions of the Constitution, necessary, appropriate, and plainly adapted to effectuate its purposes, that—"he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution, such other oath of office as its wisdom might suggest does not impress us as entitled to much weight in construing a provision of the Constitution which the court was not considering and to which the doctrine "that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution," can have little, if any, application. This seems to us more obvious when it is noted that the oath prescribed by the Constitution is simply to support the Constitution. In the line of the doctrine stated it might be said that an oath to faithfully discharge the duties of the office was a proper "means for their execution," and one reasonably involved in the implied powers.

It is suggested that the existence of the clause "but no religious test shall ever be required as a qualification to any office or public trust under the United States," which is found in Article VI of the Constitution, in a paragraph relating wholly to oaths, has a direct tendency to show that the previous paragraph in Article I, section 2, prescribing qualifications, was not intended to be exclusive, inasmuch as this paragraph in Article VI is said to add a qualification which is entirely inconsistent with the idea that the prior paragraph was exclusive. Reflection, however, leads us to the conclusion that this paragraph in Article VI has no proper connection with or relation to the paragraph in Article I, section 2. We think the word "qualification" in connection with "religious test" is used in an entirely different sense from that in which the word "qualification" is used in Article I, section 5. It is clearly applied to and is a description of the "religious test," and must be construed in connection with that phrase, no "religious test * * * as a qualification." The clause is found in a paragraph which relates solely to the oath to be administered.

Qualification, when used in discussing the elements which a member-elect must possess in order to be entitled to enter upon the office, is synonymous with eligibility. This is substantially the definition of legal lexicographers—Bouvier, Rapalje, and Anderson. "The recognized legal meaning in our constitutions" of the word "test" "is derived from the English test acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding

of framers of constitutions." (Attorney-General *v.* Detroit Common Council (58 Mich., 217); Anderson's Dictionary of Law, "Test;" "Test act;" "Test oath.")

The English test acts (25 Geo. II, c. 2) required persons holding office within six months after appointment to take the oath of allegiance and supremacy, and subscribe a declaration against transubstantiation, and receive the sacrament according to the usage of the Church of England. The qualification of a "religious test" thus prohibited relates clearly to something "required" to be done by an officer when entering upon or after having entered upon the office, and not to qualifications or elements of eligibility which he must possess or disqualifications or elements of ineligibility which he must not possess before he can enter upon the office. Qualification or disqualification, eligibility or ineligibility is a status that either does or does not exist at the time of entering upon the office. The qualification of a religious test has no existence as a status; it is not a status, it is simply a condition to be performed. No member can change his status as to the elements of eligibility or qualification as defined in Article I, section 2, at the time of entering upon the office; but if the qualification of a religious test existed every member could, if his conscience were sufficiently elastic, comply with the test. One is predicated upon the past and the other upon the future. One relates to things done or not done; the other to things to be done.

An examination of the constitutional history of this clause fully corroborates this view. The last paragraph of Article VI, with the exception of the clause as to the test oath and the word "affirmation" (which was added by amendment), is substantially Article XX of the first draft of the Constitution, as reported by the committee of detail August 6, 1787. (The Madison papers, containing debates on the Confederation and Constitution, vol. 5, p. 381; Elliott's Debates.)

The clause in question first appears in the proceedings August 20, 1787, and was introduced by Mr. Pinckney, as an independent proposition to be referred to the committee of detail, and then read: "No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States." (Ibid., 446.)

That the word "qualification" as here used related to the oath, and to nothing else, is too clear for argument, and that it was not used in the sense in which it was used in Article I, section 5, is likewise clear. This conclusion is emphasized by the fact hereafter noted that it was at one time proposed, by an independent constitutional provision, to confer upon the legislature express authority to add one qualification. The effort failed, and it is hardly to be supposed that the Constitution makers would do indirectly by this clause what they had directly decided not to do. Later, when Article XX was being considered, Mr. Pinckney moved as an amendment to the article his original proposition in precisely the language in which it now appears in the Constitution. (Ibid., 498.)

There is nothing in the proceedings to indicate that by a change in the phraseology he intended any change in its meaning. The selection by him for amendment of the clause as to the oath, and not that relating to the qualification, is in harmony with this view.

For these reasons it seems to us that the clause relating to religious tests can serve no legitimate purpose in enlarging that prescribing the elements of eligibility.

With the exception of *Barker v. The People* (20 Johns. (N. Y.), 457), which is affirmed in *Barker v. The People* (3 Cowen, 636) and *Rogers v. Buffalo* (123 N. Y., 173), hereinafter discussed, we do not find any case construing a similar constitutional provision which sustains the right to add qualifications.

Among the elementary writers, Throop on Public Offices, section 73, says:

"The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the Constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the Constitution."

But he cites no authority to sustain his text as to constitutional offices.

Cushing (Law and Practice of Legislative Assemblies, p. 195, sec. 477) says: "To the disqualifications of this kind may be added those which result from the commission of some crime, which would render the Member ineligible," and cites no authority.

Burgess, in his work on Political Science and Constitutional Law, without giving any authority, says:

"I do not think that either of these bodies can add anything, in principle, to these constitutional qualifications. Certainly the Commonwealths can not add anything in principle or in detail. They have attempted to do so, but Congress has always disregarded these attempts. If the Congress can add anything by law, or if either House can do so through the power of judging of the qualifications of its

Members, it must be something already existing, by reasonable implication, in these constitutional qualifications. For example, I think it certain that either House might reject an insane person, i.e., might require sanity of mind as a qualification, or might exclude a grossly immoral person, i.e., might require fair moral character as a qualification. (Vol. II, p. 52.)

"The Commonwealths can not add to or subtract from these qualifications. On the other hand, the Congress may by law, or either House may, in the exercise of the power to judge of the qualifications of its Members, make anything a disqualification that is reasonably implied in the constitutional provisions in regard to this subject. Certainly they may make the corrupt use of his powers by a legislator a disqualification; and they have done so." (Vol. II, pp. 52, 53.)

The case of Whittemore, in the Forty-first Congress, is suggested as a legislative precedent for the right to exclude. We have examined that case with care, and we feel bound to say that we do not think it entitled to any weight as a precedent. The argument upon which it was based shows the action of the House to have been unwarranted and ill advised in excluding Whittemore. The only speeches made in support of the proposition were by Mr. Logan. He does not in any way refer to the one great legal question involved, as to whether Congress, to say nothing of the House, acting alone, had the power to add to the qualifications specified in the Constitution, and that question was not raised during the debate, although at that time (1870) several State courts, one at least, had discussed it, *People v. Barker* having been decided in 1824.

The House had, apparently, never heard that there was such a question. The only provision of the Constitution that could possibly justify the action of the House, that constituting the House the judge of the "election returns and qualifications of its own Members," was not referred to directly or indirectly, and, if the debate is the criterion, the House acted without any reference to it whatever. The clause stating the qualification was incidentally referred to once. Indeed, they apparently acted upon an entirely different provision that does not relate to exclusion or determining eligibility or qualifications, and Mr. Logan distinctly based his case upon it when he says:

"I base my opinion, first, upon the Constitution of the United States, which authorizes Congress to prescribe rules and regulations for the government of their Members, and provides that by a two-thirds vote either House may expel any one of its Members without prescribing the offenses for which either House may expel."

He then proceeded to make this gratuitous and unwarranted assumption:

"This being the theory with which I start out, I then assume that where the House of Representatives has power to expel for an offense against its rules or a violation of any law of the land, it has the same power to exclude a person from its body."

Without giving any attention to the legal distinctions involved, or even referring to the constitutional right of passing upon qualifications, or adverting to the fact that exclusion is the act of a majority and expulsion of two-thirds, he begs the whole question and assumes their identity. He quotes a statute which makes a disqualification to hold office absolutely dependent upon a conviction, and then assumes it disqualified Whittemore, although there had been no conviction. He admits there was no Congressional precedent for the action which he proposed. He cites the *Wilkes* case in the English Parliament as a precedent, when, as he states it, that case was directly in point against him. *Wilkes*, he says, was elected four successive times to the same Parliament, three times without opposition and the fourth time against an opposing candidate. Three times he was expelled. The fourth time his opponent was seated. Neither time, according to his statement, was *Wilkes* excluded.

Just how that case could be an authority for excluding as against expelling Whittemore we can not see. These considerations (and many more could be suggested), in view of the fact that the House, under Mr. Logan's lead, absolutely refused to allow any committee to examine, for the information of the House, the legal questions involved or to have the case referred to any committee—though such a course was desired by such men as Poland of Vermont, Farnsworth of Illinois, and Schenck and Garfield of Ohio—and would not allow Schenck and Garfield to be heard on the law for even ten minutes each, deprive this case, in our opinion, of all weight as a precedent.

As might perhaps be expected, Mr. Logan's statement of the *Wilkes* case was by no means accurate. It is extremely interesting, as well as important, to note that the whole history of that case is a striking condemnation of the position of Mr. Logan. While the record is not full, and the distinction between the power of exclusion and that of expulsion was not emphasized in argument, the result makes it the

conspicuous proposition. On the occasion of Wilkes's third election the House of Commons adopted this resolution:

"That John Wilkes, esq., having been in this session of Parliament expelled this House, was, and is, incapable of being elected a member to serve in the present Parliament." (Cavendish, *Debates*, vol. I) p. 231.)

In opposing the adoption of this resolution, Edmund Burke said:

"I rise to obtain some information upon this great constitutional point. You are going to make a disqualification of a member to sit in Parliament; you are going to make a disqualification contrary to the unanimous opinion of a whole county. Words have been thrown out by the noble lord importing that this is the law of Parliament. Is that, sir, a fact? Is this the law of Parliament? I wish to have that law established on the ground which establishes all laws. Has it acts of Parliament? It has none. Has it records? Has it custom? I have not heard a variety of precedents used." (Ibid., p. 231.)

Here it will be seen that of all who took any part in that debate, the only man who lives in history made the specific point that the House of Commons was adding, in violation of law, by its own action, a disqualification in Wilkes's case. The resolution which declared Wilkes ineligible in effect was adopted by an overwhelming majority February 17, 1769. Before this he had been twice expelled. May 3, 1782, when reason had resumed its sway and the House was no longer overawed by power, a resolution revising in emphatic terms a portion of its prior action in the Wilkes case was adopted. It is significant that it did not attempt to impeach the propriety or validity of the action of the House in twice expelling Wilkes, but it wholly reversed its action in establishing a disqualification and then excluding him therefor. The resolution adopted on the motion of Wilkes himself reads:

"That the said resolution [that of February 17, 1769, declaring him incapable of being elected] be expunged from the journals of this House, as being subversive of the rights of the whole body of electors of this Kingdom." (Hansard, vol. 22, p. 1409.)

That the significance of this resolution and its vital importance, as declaring the lack of power of one branch of the legislature to add a qualification, was fully appreciated at that time, clearly appears from the discussion on its adoption. While Fox conceded the principle, he thought the resolution unnecessary, as it would not have the force of law and would not change the doctrine. The Lord Advocate agreed with Mr. Fox and spoke principally to the "idea of excluding anyone from a seat in that House by a mere resolution of the House, and without the concurrence of the other branches of the legislature. Such a resolution would be contrary to all law, and to the very spirit of the Constitution, according to which no one right or franchise of an individual was to be taken away from him but by law." (Ibid., p. 1411.)

May, in his able work on Parliament, very clearly states the law when he says:

"But, notwithstanding their extensive jurisdiction in regard to elections, the Commons have no control over the eligibility of candidates, except in administration of the laws which define their qualifications." (May on Parliament, p. 53.)

Thus at that early day was the distinction between exclusion and expulsion emphasized by the House of Commons and the first legislative precedent established against the pretended right to add a disqualification for office in violation of law.

So far as the Edmunds Act, which does not require a conviction for disqualification, goes, the case of *Barker v. The People* (3 Cowen, 686) is distinctly adverse to the conclusion of the majority of the committee. The court were passing upon the validity of a statute authorizing a judgment rendering a party ineligible to office on a conviction for sending a challenge to fight a duel, and the court sustained the judgment in the following expressive language:

"Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined; and according to my views of that question, there may be an exclusion by law, in punishment for crimes, but in no other manner and for no other cause."

Again—

"I therefore conceive it to be entirely clear, that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required."

It appeared that no qualification whatever in respect to members of the assembly was required

by the Constitution, and the court said, *arguendo*, that a regulation requiring a member of the assembly to be a freeholder "would be an infringement of the Constitution." There was a blank, not even a negative provision.

We do not understand that *Rogers v. Buffalo* (123 N. Y., 173) in any way affects the authority of *Barker v. The People*, *supra*, but on the other hand cites it with approval, and clearly distinguishes from it the case which they were deciding. They were construing a statute which created a board of civil-service commissioners, and after citing and assenting to *Barker v. The People*, *supra*, said (p. 184):

"But, in our judgment, the legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to an arbitrary exclusion from office, nor to a general regulation requiring qualification not mentioned in the Constitution."

The opinion thus clearly eliminated the constitutional question as to eligibility and determined the case upon another ground.

Sound reason does not sustain this claimed right to exclude. If the construction contended for is admitted, it must be conceded that the power of adding qualifications is unlimited, as there is nothing in the Constitution which circumscribes it. The suggestion in *Barker v. The People* that the only power to add is in case of a conviction of crime is purely arbitrary and gratuitous, and absolutely no constitutional authority is given therefor. The rigid confinement by the court of the right to break away from the Constitution to a conviction for crime must have been in the nature of expiation, a satisfying of the judicial conscience for the departure thus made from the Constitution. If the power exists, it must be unlimited, and, therefore, while you can not take from or narrow the two elements first specified, you have unlimited power to add to them. For instance, unless a man is at least 25 years of age he is not eligible, therefore the Constitution does not undertake to say that a greater age may not be required. In fact, the necessary inference is that only the minimum limit as to age has been established, and the legislature has unlimited power to add to that qualification, and hence may require all Representatives to be 50 years of age. The same course could be pursued with reference to the seven years' citizenship clause: You can not act within the domain to which the Constitution has confined itself. Outside of it, you can do anything. We can not indorse any such doctrine or help to work it into a decision of the House in the case now under consideration.

The consequences just suggested are the logical result of the theory, and while the illustrations are extreme, they are the best test of the principle. Would anyone feel justified in asserting that any such change in the age qualification was either contemplated or is possible? Yet it must have been, and must be, if the argument is sound.

Inasmuch as the argument of John Randolph in 1807 is thought to be able, ingenious, and persuasive upon this clause, we have taken occasion to examine it, and find him expressing "extreme surprise" because the Committee on Elections had so construed this clause as to restrict "the States from annexing qualifications to a seat in the House of Representatives. He could not view it in that light. Mark the distinction between the first and second paragraphs. The first is affirmative and positive." Then he draws a contrast between the affirmative and negative provisions. He conceded that if the Constitution had read in the affirmative it would have settled the question of qualification and been exclusive. He does not appear to have gone for light to the proceedings of the Federal Convention. The House in that case, *Barney v. McCreery* (*Digest Election Cases*, vol. 1, p. 157), decided against his contention, and his proposition has long been obsolete.

The whole case of the right to add qualifications is based upon the fact that such qualifications as are prescribed are negatively expressed. The juxtaposition of the affirmative and negative clauses, it is said, has some significance. It does not appear that any of the courts' elementary writers or lawyers that have had occasion to insist upon this have ever availed themselves of the debates in the Federal Convention for the purpose of ascertaining the intention of the framers of the Constitution. While this precaution has not hitherto been observed, common fairness and a due regard for a thorough investigation require that these great men, whose handiwork has so well withstood the assaults of time, should now and upon this important question be allowed to speak for themselves. An inquiry as to the origin of this clause will not only be interesting and instructive, but possibly determining. This course is stated by Cooley to be proper. (*Cooley's Constitutional Limitations*, p. 80.)

And Story, in his great work on the Constitution, makes constant use of the debates in the Federal Convention.

In the report of the committee of detail giving the first draft of the Constitution, August 6, 1787 (Madison Papers, etc., vol. 5, p. 376), the paragraph in question appears as an independent section, i. e., section 2, Article IV, and reads:

"SEC. 2. Every Member of the House of Representatives shall be of the age of twenty-five years at least, shall have been a citizen of the United States for at least three years before his election, and shall be at the time of his election a resident of the State in which he shall be chosen."

It is significant that this section is affirmative, and is therefore exclusive, as is conceded, in its character. It is important to inquire whether the change in phraseology was made for the purpose of changing its legal effect. That it was understood by the framers of the Constitution to be exclusive will, we think, clearly appear. The first consideration which indicates this is the incorporation in the same draft of the Constitution of section 2 of Article VI, which reads:

"SEC. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the Members of each House, with regard to property, as to the said Legislature shall seem expedient."

The inference that the framers of this draft must have understood that section 2 of Article IV was exclusive, and that in order that the legislature might have any power at all over qualifications it was necessary to confer it by a later and specific provision, is imperative and obvious. The debates confirm this idea.

Madison opposed the proposed section 2, Article VI, "as vesting an improper and dangerous power in the legislature. The qualifications of elector and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees subvert the Constitution.

"A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected as the number authorized to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their constituents, there was the same reason for being jealous of them as there was for relying upon them with full confidence when they had a common interest. This was one of the former cases."

Gouverneur Morris moved to strike out "with regard to property," in order, as he said, "to leave the legislature entirely at large"—precisely what is now claimed without any such constitutional provision. This was objected to by Mr. Williamson on the ground that should "a majority of the legislature be composed of any particular description of men—of lawyers, for example—which is no improbable supposition, the future elections might be secured to their own body."

Mr. Madison further observed that "the British Parliament possessed the power of regulating the qualifications both of the electors and the elected, and the abuse they had made of it was a lesson worthy of our attention. They had made changes in both cases, subservient to their own views of political or religious parties." (Madison Papers, etc., vol. 5, p. 404.)

This article was not agreed to.

Note the significance and primal importance of Mr. Madison's assertion that "the qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution," as otherwise the legislature might "subvert the Constitution."

His insistence upon these grounds prevented the adoption of the provision that only conferred this power upon the legislature in one particular, and the convention thus evidently adopted his views as to the exclusiveness of the provisions of Article IV, section 2.

Again, when the original proposition which resulted in Article IV, section 2, was under discussion prior to the draft reported by the committee of detail, Mr. Dickinson opposed the section altogether, expressly because it would be held exclusive, saying he "was against any recitals of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would, by implication, tie up the hands of the legislature from supplying omissions." (Ibid., p. 371.)

Mr. Wilson took the same view, saying, "Besides, a partial enumeration of cases will disable the legislature from disqualifying odious and dangerous characters." (Ibid., 373.)

When this section in the draft was under discussion, after "three" had been stricken out and "seven" inserted as to citizenship, Alexander Hamilton moved "that the section be so altered as to require merely citizenship and inhabitancy," and suggested that "the right of determining the rule of naturalization will then leave a discretion to the legislature on the subject which will answer every purpose." (Ibid., p. 411.)

Here it is clear that, as Hamilton construed this provision, without this latitude as to naturalization, the legislature had no discretion or power. From the affirmative language of this provision, then, as it stood in the report of the committee of detail, and the understanding of the framers of the Constitution, it is clear that it was exclusive. This section was not changed to the negative form by amendment or as the result of any debate. In its affirmative form with other sections that had been finally acted upon, and their construction and terms definitely settled, it was referred to a committee "to revise the style of and arrange the articles which had been agreed to by the House," and this committee consisted, among others, of Mr. Hamilton, Mr. Gouverneur Morris, and Mr. Madison. (*Ibid.*, p. 530.)

This committee had no power to make any change in the legal effect of any of the clauses submitted to them. They were simply "to revise the style of and arrange." Certainly, with his very pronounced views, Mr. Madison would not have made a change in Article IV, section 2, that would, in his opinion, have placed it within the power of the legislature to "subvert the Constitution."

Yet, when the committee reported the Constitution as it now stands, Article IV is rearranged so as to be included in Article I, and the original affirmative section 2 of Article IV appears in the negative form as the second independent paragraph of Article I, somewhat changed, it is true, but in no sense connected with or dependent upon the preceding paragraph, which, with an improvement in phraseology, is section 1 of Article IV of the draft. This reference to the original sources of information, we submit, deprives the argument sought to be derived from the juxtaposition of all significance. (*Ibid.*, p. 559.)

An examination of the finished work discloses the fact that the rearrangement and changes in phraseology by the committee were extensive. The object unquestionably was to make the arrangement more orderly and lucid and the language more perspicuous and felicitous. To hold that in any particular any change was intended to be made in the legal effect is to impeach the integrity of men whose characters are of the most illustrious in our history. To assert that they unwittingly made such changes is a much more grievous assault upon their intelligence and ability.

Moreover, we are not left to inference as to how this clause in its present form was interpreted by the most eminent of the framers of the Constitution. The *Federalist*, as is well known, was published while the Constitution was undergoing public discussion, and while it was being ratified by the States. It had been ratified by six States only when the numbers of the *Federalist* hereafter referred to appeared. The author of No. 52 evidently assumes that all of the qualifications of representatives had been "very properly considered and regulated by the convention."

He says:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A Representative of the United States must be of the age of 25 years; must have been seven years a citizen of the United States; must at the time of his election be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith."

If the learned author had supposed that any limitations in addition that might appeal to the caprice of a legislature could be added, he would hardly have used the term "these reasonable limitations," as he evidently did, as descriptive of all of the limitations to be imposed. In No. 57 a general reference to this clause is made, which evidently proceeds upon the idea that the qualifications to be required are stated in the Constitution. It reads: "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil professions is permitted to fetter the judgment or disappoint the inclination of the people."

How could he know that unless the Constitution settled the qualifications? The authorship of these two numbers is in doubt between Madison and Hamilton. Hamilton is conceded to be the author of No. 60, and with many no authority is greater than his; and this, so far as his authority goes, settles it beyond cavil. He says:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property, either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. The qualifications of the

persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature.”

This unequivocal declaration was made after the negative form of expression had been adopted; made concerning the provision as it now exists in the Constitution. It is not contended that the Federalist was a determining factor in securing the ratification of the Constitution, though it was undoubtedly published for that purpose. So far, however, as this clause weighed in the public mind, as this is the only construction that appears to have been placed upon it, it may be inferred that this construction was adopted by the States which afterwards ratified.

In the light of these facts it is to be deplored that exigencies arise which are supposed to justify a construction in direct conflict with the intention and interpretation of those who framed and assisted in ratifying the Constitution. It seems clear that the negative form of expression has no interpretive significance, and as it affords no support for the proposition which involves the right to add qualifications, that proposition must fall with the erroneous construction upon which it is based.

The great weight of the other authorities sustains this conclusion.

In *Thomas v. Owens* (4 Md., 223) the court said:

“Where a constitution defines the qualifications of an officer, it is not within the power of the legislature to change or superadd to it, unless the power be expressly, or by necessary implication, given to it.”

And in *Page v. Hardin* (8 Ben. Mon., 661) the court said:

“We think it entirely clear that so far as residence is to be regarded as a qualification for receiving or retaining office, the constitutional provision on the subject covers the whole ground, and is a denial of power to the legislature to impose greater restrictions.”

In *Black v. Trover* (79 Va., 125), also, the court said:

“Now, it is a well-established rule of construction, as laid down by an eminent writer, that when the Constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications thus defined.”

Mr. Justice Story is conceded to be one of the greatest authorities upon the construction of the Constitution, and upon this point he states the law as follows:

“It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.” (Story on the Constitution, see. 625.)

Cooley certainly stands equal in authority to Story, and he says:

“Another rule of construction is that where the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the supreme court of Maryland that where the Constitution defined the qualifications of an officer it was not in the power of the legislature to change or superadd to them, unless the power to do so was expressly, or by necessary implication, conferred by the Constitution.” (Cooley’s Constitutional Limitations, p. 78.)

Cushing, as against his former statement, says:

“The Constitution of the United States having prescribed the qualifications required of Representatives in Congress, the principal of which is inhabitancy within the State in which they shall be respectively chosen, leaving it to the States only to prescribe the time, place, and manner of holding the election, it is a general principle that neither Congress nor the States can impose any additional qualifications. It has therefore been held, in the first place, that it is not competent for Congress to prescribe any further qualifications or to pass any law which shall operate as such.” (Cushing on Law and Practice of Legislative Assemblies, second edition, p. 27, sec. 65.)

John Randolph Tucker, one of the latest writers on the Constitution, and an able one, is explicit on this point:

“Nor can the Congress nor the House change these qualifications. To the latter no such power was delegated, and the assumption of it would be dangerous, as invading a right which belonged to the constituent body, and not to the body of which the representative of such constituency was a member. (Tucker on the Constitution, 394.)

"The principle that each House has the right to impose a qualification upon its membership which is not prescribed in the Constitution, if established, might be of great danger to the Republic. It was on this excuse that the French directory procured an annulment of elections to the Council of Five Hundred, and thus maintained themselves in power against the will of the people, who gladly accepted the despotism of Napoleon as a relief. (Foster on the Constitution, p. 367.)

"It is a fair presumption that where the Constitution prescribed the qualifications it intended to exclude all others. (Paschal's Annotated Constitution, second edition, p. 305, sec. 300.)

"Where the Constitution prescribed the qualifications for an office, the legislature can not add others not therein prescribed." (McCrary on Elections, see. 312.)

McCrary also takes the ground that statutory and constitutional provisions making ineligible to office any person who has been guilty of crime presuppose a conviction before the ineligibility attaches. (Ibid, p. 345.)

Paine, in his work on elections, takes the same view (pp. 104–108).

Certainly the great weight of authority is against the right to add, even by law, to the qualifications mentioned in the Constitution.

478. The case of Brigham H. Roberts, continued.

In 1900, in a sustained report, the majority of the committee held that a Member of Congress was an officer, subject to statutory disqualifications as such.

Discussion of the laws of Congress against polygamy as creating a statutory disqualification.

Discussion of the oath of July 2, 1862, as creating a statutory disqualification.

3. As to the status of the Member as an officer, and disqualifications under the statute:

The majority report says:

We present now the statutory declarations where disqualifications have been imposed.

Section 21 of the act of April 30, 1790, is as follows:

"That if any person shall, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security, for the payment or delivery of any money, present, or reward, or any other thing, to obtain or procure the opinion, judgment, or decree of any judge or judges of the United States, in any suit, controversy, matter, or cause depending before him or them, and shall be thereof convicted, and so forth, shall be confined and imprisoned, at the discretion of the court, and shall forever be disqualified to hold any office of honor, trust, or profit under the United States."

Section 5499, which was passed in 1791, provides: "That every judge of the United States who in any way accepts or receives any sum of money or other bribe, etc., shall be fined and imprisoned, and shall be forever disqualified to hold any office of honor, trust, or profit under the United States."

Is a Member of Congress an officer?

Before citing other acts of Congress it is proper to discuss the question as to whether a Member of Congress is an officer within the meaning of the statute.¹

If a Member of Congress is not an officer, if the qualifications of a Member of Congress are only those named in the Constitution, then, of course, the makers of the Constitution meant that nobody could be made ineligible for Congress, either by law or by the act of either body, even though laws passed immediately after the adoption of the Constitution made him ineligible for all other positions under the Government.

¹The question as to whether or not a Member of the Senate or House is an officer of the United States was discussed incidentally in a learned debate in the Senate on December 19, 1863, and January 20, 21, and 25, 1864, the occasion being a proposed rule, which was agreed to, providing that Senators should take and subscribe in open Senate to the oath or affirmation provided by the act of July 2, 1862. (First session Thirty-eighth Congress, Globe, pp. 48, 275, 290, 320–331.)

Now, upon that proposition we make these observations as to the meaning of the word "office."

First. Undoubtedly under the Constitution, in one or two instances, the word "office" does not include Representatives in Congress, as, for example, the last paragraph of section 6, article 1: "No person holding any office under the United States shall be a Member of either House during his continuance in office."

In that case the words "holding any office" means an office other than a Member, but the context is absolutely unmistakable, and no person is in danger of assuming, even if a Member of Congress hold an office, that it meant to say that no Member of Congress shall be eligible to be a Member of Congress.

In the second place, the provision in the last paragraph of section 3 of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he is to commission Members of Congress, but he is himself an officer, and he does not commission himself, nor does he commission the Vice-President, who is also an officer under the United States.

So also paragraph 2, section 1, article 2: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

There the distinction is made "No Senator or Representative, or person holding an office of trust."

But under the Constitution the word "office" must include in certain of its provisions a Representative in Congress.

It is inconceivable that in the Constitution the word "office" never includes a Member of Congress. Look at the last paragraph of section 3, article 1.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

It is conceivable that the framers of the Constitution meant that a man might be adjudged guilty in case of impeachment, and that that judgment of guilty could carry with it a judgment disqualifying him from holding any office, save only to be a Representative or Senator in Congress?

Paragraph 8, section 9, article 1, is as follows: "No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."

Did the Constitution mean that Representatives and Senators in Congress could receive emoluments, presents, office, or title from some king, prince, or foreign state, but no other person holding an office could without the consent of Congress?

But in the next place, as to statutes. Whatever may be held to be the meaning of the word "office" in the Constitution, it does not follow that the same meaning must be given to it in the statutes. We find a varying meaning in the Constitution, and we find a varying meaning in the statutes. The act of 1790 has always been assumed to cover Members of Congress.

Section 5500 of the Revised Statutes, originally passed in 1853, and now in substantially the form in which it was when originally passed, provides: "Any Member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money, * * * either before or after he has been qualified or has taken his seat as such Member, with intent to have his vote or decision on any question, matter, cause, or proceeding * * * pending in either House, * * * shall be punished by a fine, etc."

Section 5502 is as follows: "Every Member, officer, or person convicted under the provisions of the two preceding sections who holds any place of profit or trust shall forfeit his office or place, and shall thereafter be forever disqualified from holding any office of honor or trust or profit under the United States."

This section applies explicitly to a Member of Congress, and brings forfeiture of the office or place held by him. If "office" in this section does not include a Member of Congress the word "place" must include him.

Now, the word "office" in that concluding part of this section must refer to "Member." First, because the word "office" is used in the preceding line as necessarily including a place that is held by a Member. It can not fail to include that, for it refers to a "Member" and what shall happen to him. In the next place, because it is not conceivable that the legislative body intended that the violation of that law by a Member should forfeit the position that the Member had and then not intend to disqualify him from being elected again as a Member of the House when it disqualifies him from holding all other offices or places under the United States.

But that is not the only statutory construction of the word office. It is still more explicitly declared in the test-oath act, of July 2 1862: "That hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation:

"I, A B, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto.

"And I do further swear (or affirm) that to the best of my knowledge and ability I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

"Which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain."

"Any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever thereafter of holding any office of trust under the United States."

It will be noticed that the only person required to take that oath is an officer, a person elected or appointed to any office of honor or profit, but it does not include in this phraseology a Member.

By reference to the concluding portion of the act it will appear that the word office does not include a Member of Congress.

"Which said oath so taken and signed shall be preserved among the files of the court, House of Congress, or department to which the said office may appertain."

We not only have the use of the word "Congress" as indicating to what the word "office" appertains, but also the universal, unquestioned construction by the acts of the Senate and of the House in compelling the test oath to be taken year after year until it was repealed. Each House of Congress recognized that that oath was an oath to be taken by a Representative in Congress, notwithstanding the fact that the act passed made it apply only to a person elected or appointed to an office of honor or trust in the United States.

We quote this section here, as well for the purpose of showing the Congressional precedents imposing a substantial qualification, or disqualification, upon the Members of Congress, really substantial in its character, as the facts of history show, as to exhibit what is meant in the statutes by the word "office."

There are many other statutory provisions, passed from time to time since 1790, disqualifying for office of trust or profit under the United States persons guilty of the several crimes defined in those statutes. We do not refer to them specifically, but they are illustrated by the statutes already quoted.

It ought also to be said that section 8 of the Edmunds Act, whatever meaning may be given to it, evidences the legislative will to disqualify polygamists for office. It indicated the legislative purpose so aptly described by Justice Matthews, in the Ramsey case, when he said that no more cogent or salutary method could be taken than was taken by the Edmunds Act, which undertook to withdraw from all political influence those persons who showed a practical hostility to the development of a commonwealth based upon the idea of the union for life of one man and one woman in the holy estate of matrimony.

The statutory declaration, if we may use that form of expression as applicable to the joint action of the House, coupled with the President's approval, is only a more solemn declaration by both Houses of the principle that it has the right to exclude under certain conditions; that either House may do it. That very point was made in the discussion on the test oath in the Senate—that of course that law could not with certainty bind any succeeding Senate or any succeeding House, but that it was apparent that so long as there existed any necessity for such an oath, and in the very nature of things the time would come in a few years when it would not be necessary, either House would respect its requirements and compel a submission to it; and that was the action of the Senate and House for nearly twenty years.

The minority, in their views, hold:

If the right to add a disqualification by law be assumed, the disqualification imposed by the Edmunds Act does not apply to a Member of Congress, and therefore does not affect Mr. Roberts. The only portion of the section that can be said to have any application to a Member of the House of Representatives is that which declares that no polygamist, etc., shall "be entitled to hold any office or place of public trust, honor, or emolument, * * * under the United States." Unless a Member of the House holds an office "under the United States," within the meaning of the Constitution and the law, there is no disqualification.

As to the nature of their offices, whether "under the United States" or otherwise, Members of the House and Senate are evidently the same. The words "office" and "offices" occur in the Constitution and amendments twenty-three times, and the words "officer" and "officers" fifteen times, and, with the exception of possibly two instances, these terms are never used, either directly or indirectly, as relating to or in connection with a Representative or Senator.

One possible exception referred to is found in Article I, section 3, and reads: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

The term "office" "in the first clause, as to "removal from office," clearly does not relate to a Member of either House, as it will be seen that the provisions as to impeachment do not apply to them. It would seem that a civil officer guilty of conduct that would justify impeachment ought not to be eligible to a seat in Congress, though unless the clause "office of honor, trust, or profit, under the United States" be held to include a Member, he could not be disqualified thereby. Still, if a Member is not the subject of impeachment, there is perhaps as much reason in exempting him from the disqualifications of impeachment.

The other possible exception is in Article I, section 9, paragraph 8: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Standing alone, we might understand the paragraph as broad enough and comprehensive enough to include Members of Congress, but, taken with the other provisions of the Constitution and they are numerous—wherein the like terms do not embrace or apply to Senators or Representatives in Congress, what support can this paragraph possibly afford to those who invoke it as authority for adding anything whatever to the prescribed qualifications of a Representative?

The clause in Article I, section 6, provides: "And no person holding any office under the United States shall be a Member of either House during his continuance in office."

Here it is very clear that "any office under the United States" can not include a Member, as otherwise it would be equivalent to a provision that no Member of either House shall be a Member of either House during his continuance in office—an absurdity. A clause in Article II, section 1, provides: "But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Here "Senator or Representative" and "person holding an office of trust or profit under the United States" are used in the alternative, or in contradistinction from each other. If they were one and the same, their separate enumeration was unnecessary. If identical, there would be no occasion to particularize "Senator or Representative."

If identical, the adjective "other" should have been used, so that the clause should read, "or person holding any other office of trust or profit under the United States," etc.

These observations apply to the following provisions:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, etc. (Constitution, Art. VI.)

"No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath," etc. (Fourteenth Amendment, sec. 3.)

Article II, section 4—"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors"—has been construed by the only tribunal therefore known to the Constitution,

the Senate sitting as a court of impeachment, which held that a Senator was not a "civil officer," and therefore was not liable to impeachment. It was the case of William Blount, a Senator, who was impeached before the bar of the Senate by the House of Representatives. In his plea he claimed that as a Member of the Senate he was not one of the "civil officers of the United States," and on the 11th of February, 1797, the Senate announced its conclusion as follows:

"The court is of the opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that said impeachment is dismissed." (Annals of Congress, vol. 8, p. 2319.)

Story concurs in this view. (Story on the Constitution, sec. 792.)

Who can be said to hold office "under the United States" was practically decided in *United States v. Germaine* (99 U. S., 508–512), where the court said:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

In *United States v. Mouat* (124 U. S., 303–308), the *Germaine* case is cited and approved, the court saying: "In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law or the head of a department."

The same principle is affirmed in *United States v. Hendee* (124 U. S., 309–315).

If, then, "all its officers," "under the Constitution," are appointed in the manner above indicated, clearly a Member of either House does not hold an office "under the United States," and the Edmunds Act can not apply.

(4) Applying the law to the facts the majority of the committee found three distinct grounds of disqualification of Roberts:

(a) By reason of his violation of the Edmunds Act and the declared policy of disqualification in section S.

On this point the majority report holds—

Let us see in what attitude and status the claimant appears and claims the right to be sworn in. No appreciative opinion as to his status can be formed without some knowledge of the judicial and statutory characterization of his offense.

Section 5352, passed by Congress in 1862, declared: "Every person having a husband or wife living who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years."

It did not, however, make unlawful the practice of polygamous living. There was no pretense of obedience to this law in Utah, the claim being made that it was unconstitutional because an interference with the religion of the Mormons. There is no doubt but that a large body of the Mormons, not only those who practiced polygamy, but those that did not, believed that the act of 1862 was an unconstitutional infraction of their rights.

In 1878, however, in the case of *Reynolds v. The United States* (98 U. S., 145) the Supreme Court held that section 5352 was "in all respects valid and constitutional." So that after 1878 no man in Utah could claim that the practice of polygamy was right as related to the laws of the land without doing violence, not only to the statute, but to the unanimous opinion of the highest court of the land.

The opinion in this case was by Chief Justice Waite, and in the course of it polygamy receives judicial characterization as follows (we think, it highly important to quote it because it is a judicial declaration and leads us up to a proper recognition of Mr. Roberts's status):

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.

"By the statute of James I the offense was made punishable by death.

"It is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration of the bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of James I, death penalty included, because as recited in the preamble, 'it hath been doubted whether bigamy and polygamy be punishable by the laws of this Commonwealth.' From that day to this we think it may safely be said there never has been a time in any State of the Union where polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity."

And continuing the quotation:

"Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests. Professor Lieber says polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle can not long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound.

"Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

So also in *Murphy v. Ramsey* (114 U. S., 45). Construing the Edmunds Act, Justice Matthews says:

"Certainly no legislation can be supposed more wholesome and necessary in the founding of a free self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

How cogent and prophetic are these words. How applicable to this situation; that all political influence ought to be withdrawn from those practically hostile to the establishment of a "Commonwealth on the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony.

There was no machinery for enforcing the act of 1862 until 1882, when Congress passed what is known as the Edmunds law. This act defined and punished bigamy and polygamy in the same terms as the act of 1862, but also punished unlawful cohabitation, and declared ineligible for office any person who maintained the status of a polygamist or who cohabited with more than one woman.

Section 8 of that act is as follows: "That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for such Territory or place, or under the United States."

This law had not only the force of a public law, but it was the outcome of years of agitation and reflection. It crystallized the sober sense of the American people; it represented the settled views of our wisest and most conservative statesmen, and later received the stamp of approval from the Supreme Court of the United States in many well-considered cases.

Prior to 1882 Brigham H. Roberts had married one Louisa Smith. She has borne him six children, and is still living.

About 1885, when Utah was fairly ringing with the blows of the Edmunds Act of 1882; while numerous prosecutions were going on and after the Supreme Court had passed upon the validity of the

act; when the American people supposed that polygamy had received its deathblow; when no man of the many whose cases went to the United States Supreme Court pretended that the provisions against polygamous marriages were invalid, with all these facts insistently before him, Brigham H. Roberts took another wife—his first polygamous wife—Celia Dibble by name, who in the following twelve years, bore him six children.

This second wife he married in defiance of the Edmunds law. He spat upon that law; he declared by his act that he recognized no binding rule upon him of a law of Congress; he declared by it that he recognized a higher law. The Congress of the United States was to him an object of contempt. The Supreme Court of the United States might declare the law for others, but not for him. He laughed at its futile decrees and spurned its admonitions. The Executive which had declared in solemn messages its gratification that polygamy seemed gone forever he defied and despised. Of what consequence to him were laws of Congress and declarations of the highest court and proclamations of Presidents as against his sensual interpretation of a sensual doctrine?

And all the time the Edmunds law declared not only polygamy but cohabitation with more than one woman unlawful. Roberts not only bigamously married a second wife, but he persisted in violating and defiantly trampling under foot every other provision of the act.

But he had not yet sufficiently proclaimed his utter contempt for the Supreme Court, for Congress and its most solemn enactments. A few years later he took a third wife.

From the time of his second marriage to the third he cohabited with two women. From the date of his third marriage down to his election, and, we doubt not, to the present time, he has been cohabiting with three women.

As recently as December 6, 1899, he defined his position as follows:

"These women have stood by me. They are good and true women. The law has said I shall part from them. My church has bowed to the command of Congress and relinquished the practice of plural marriage. But the law can not free me from obligations assumed before it spoke. No power can do that. Even were the church that sanctioned these marriages and performed the ceremonies to turn its back upon us and say the marriages are not valid now, and that I must give these good and loyal women up, I'll be damned if I would."

In this statement he adheres to the audacious assumption that the law of 1882 did not speak to him and that he did not recognize it as a rule of conduct to him.

The amnesty proclamation of 1893 and 1894 never embraced him. There was never a moment when its provisions were complied with by him. There has never been a moment since he married Celia Dibble down to the present moment when he has not been a persistent, notorious, defiant, demoralizing, audacious violator of every provision of the State and Federal law relating to polygamy and its attendant crimes. And this is the man who seeks admission to this body.

It was declared in the Kentucky cases, and in the Thomas case in the Senate, and in the Test Oath Act of 1862 that disloyalty created ineligibility; that fidelity to the Constitution was a necessary qualification to membership in this body. What is loyalty? It is faithfulness to the sovereign or the lawful government. A mere violator of the law may not necessarily be disloyal. One may violate the law and still recognize the sovereign and the lawfulness of the government. His only concern may be that he shall not be found out and punished. But that man is surely disloyal, and in the fullest sense disloyal, when by his words, his acts, and his persistent practices he declares unequivocally in this wise: "You have solemnly enacted certain laws; you have crystallized into statute the will of the sovereign people. I bid defiance to your law. I will not recognize it. I here and now before your very eyes do the things you say I shall not do. I recognize a higher law than your man-made law—no law of yours can relieve me from the obligations which I thus take in defiance of your enactments. The only thing I promise not to do is to take a fourth wife."

The case of a bribe taker, or of a burglar, or of a murderer is trivial, is a mere ripple on the surface of things, compared with this far-reaching, deep-rooted, audacious lawlessness.

What was the case of Whittemore, who was excluded, as hereafter set out? He had not been convicted of any crime, but a committee had found that he had sold a cadetship. He did not pretend that he was wiser or greater than the people, or that he had the right to sell cadetships and was above the law. The acts of Roberts are essentially disloyal. They deny the sovereign; they repudiate the lawful government. Look at them from whatever point you will, they are subversive of government. They do not merely breed anarchy, they are anarchy.

We observe that this is not a moral question. It goes to the root of our own constitutional government. What we have just quoted from Justice Waite and Justice Matthews are as much a part of our Constitution as the written instrument itself.

* * * * *

Having in mind that portion of this report in which we have heretofore set out the status and condition of Brigham H. Roberts, we would inquire where the specific provisions of the Edmunds Act place him.

Two facts appear as pertinent to this inquiry:

First. That he was convicted in 1889 of unlawful cohabitation under that act, and served a term in the penitentiary therefor.

Second. That he has been ever since 1885, and is now, a polygamist, as that word is used in section 8 of the Edmunds Act and defined by the Supreme Court of the United States in the cases of *Murphy v. Ramsey* (114 U.S., 15) and *Cannon v. The United States* (116 U.S., 55). Section 8 is as follows:

"No polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust, honor, or emolument in, under, or for any such Territory or place, or under the United States."

Reading that act as applicable to this case, eliminating the irrelevant portions, it appears as follows: "No polygamist shall be entitled to hold any office or place of public trust, honor, or emolument under the United States."

In the *Ramsey* case, above referred to, a specific distinction is made between a polygamist and a person cohabiting with more than one woman. A polygamist is a person having a certain status respecting more than one woman. The condition, therefore, of a polygamist may be merely passive and requiring no affirmative act. To cohabit with more than one woman is, however, to do an affirmative thing. The result is that one who has two or more wives that he holds out to the world as such is a polygamist, wherever he may be, while one who cohabits with more than one woman is not cohabiting except in the place in which, of necessity, cohabitation must occur.

In the *Ramsey* case the court illustrated its definition of a polygamist as being a status or condition like any other qualification for elector, or for office, and declared that it was as if Congress had undertaken to make a married man ineligible. It would be the status in that event of being a married man which would create and continue the ineligibility.

It therefore appears that the fact that a man is a polygamist is a fact that inheres in him and stays with him, and persists in remaining with him wherever he may go, so long as he is the possessor of more than one wife; and just as one who is a married man in the State of Maryland continues to be a married man if he leaves his wife at home and comes to the District of Columbia, so Mr. Roberts, being in the condition or status of a polygamist in the State of Utah, does not leave that status behind, nor does he dissociate himself from that status or cast off the garb of a polygamist by leaving his wives at home and traveling from that State into the District of Columbia.

In the very nature of things the House of Representatives, wherever it is as a House of Representatives, is in a place under the exclusive jurisdiction of the United States; therefore when Roberts comes into the District of Columbia, in the status of a polygamist, he is ineligible under the Edmunds Act to hold any office or place under the United States, and therefore ineligible to hold the position of Member of the House of Representatives.

The minority, in their views, say that if the propositions of law already laid down by them are not conclusive, then—

it seems to us very clear that no ineligibility can be predicated upon section 8 of the Edmunds Act, upon the facts as they must be conceded to exist. A brief statement of the history of the legislation involved may be useful.

The Edmunds Act became a law March 22, 1882. Section 1 amended section 5352 of the Revised Statutes of the United States, and defined and prohibited polygamy. Section 3 defined and prohibited unlawful cohabitation, and reads as follows:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have

exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

Section 8, relating to eligibility to hold office, has already been quoted.

The Edmunds-Tucker Act, which became a law March 3, 1887, supplemented the Edmunds law, imposed penalties for various kindred offenses, dissolved the corporation known as the Church of Jesus Christ of Latter-Day Saints, and contained, among other things, various provisions as to dower and the law of descent. With reference to eligibility to office it contained, among others, this paragraph, in the last part of section 24:

"No person who shall have been convicted of any crime under this act, or under the act of Congress aforesaid, approved March twenty-second, eighteen hundred and eighty-two, or who shall be a polygamist, or who shall associate or cohabit polygamously with persons of the other sex, shall be entitled to vote in any election in said Territory, or be capable of jury service, or hold any office or emolument in said Territory."

It will be noticed that this act applied only to "office or emolument in said Territory." It did not go as far as the similar provision in the Edmunds Act and apply to "any office under the United States."

February 4, 1892, Chapter VII of the laws of the Territory of Utah was enacted. Section 1 defined and punished polygamy substantially as did section 1 of the Edmunds Act. Section 2, relating to cohabitation, in all material parts is an exact transcript of section 3 of the Edmunds Act. There is no provision whatever in this act relating to ineligibility to office by reason of any of these offenses. (Laws of Utah, 1892, p. 5.)

The enabling act, authorizing the people of Utah to form a constitution and State government and to be admitted into the Union, became a law July 16, 1894. This act required the convention to provide by ordinance irrevocable without the consent of the United States and the people of the State—

"First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited."

The constitution of Utah was adopted by the convention May 8, 1895, by the people November 5, 1895, and the proclamation of the President of the United States announcing the result of the election and admitting the State into the Union was issued January 4, 1896. Article III, ordinance of the constitution, contained the provision as to religious liberty and polygamous or plural marriages in the exact language of the enabling act. (R. S. Utah, 1898, p. 40.)

Article XXIV, section 2, of the constitution reads as follows:

"SEC. 2. All laws of the Territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature. The act of the governor and the legislative assembly of the Territory of Utah entitled 'An act to punish polygamy and other kindred offenses,' approved February 4, A. D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah." (R. S. Utah, 1898, p. 67.)

This did not give the State of Utah any law making persons ineligible to any office by reason of polygamy or cohabitation, as no such provisions existed in the act of 1892, chapter 24, or in any of the "laws of the Territory of Utah."

Sections 4208 to 4216, inclusive, of the Revised Statutes of Utah (R. S. Utah, 1898, p. 899) are substantially the act of 1892. Section 2 of the act of 1892 and section 4209 of the Revised Statutes, relating to unlawful cohabitation, are precisely alike. This statute has not been changed.

The laws of the State of Utah, then, do not now impose and never have imposed any disqualification for holding office by reason of polygamy or unlawful cohabitation. Mr. Roberts was a resident of the Territory of Utah, and since its organization as a State has been a resident of the State of Utah. Under these circumstances we do not think that the disqualifications imposed by the Edmunds Act have had any operation as to him since the organization of the State of Utah. It is settled by an unbroken line of decisions that all Territorial Congressional legislation is superseded by the adoption of a State constitution and the organization of a State.

In discussing the effect of the adoption of the constitution of Louisiana upon the laws of Congress, the court, in *Permoli v. First Municipality* (3 How., 610), said:

"So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force unless they were adopted by the constitution of Louisiana as the laws of the State."

The case of *Strader et al. v. Graham* (10 How., 94) determines the same question, and says:

"The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the State since formed within the Territory and admitted into the Union. If this proposition could be maintained, it would not alter the question; for the regulation of Congress, under the old confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court any control over them. The ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject.

"But it has been settled by judicial decision in this court, that this ordinance is not in force.

"The case of *Permoli v. The First Municipality* (3 How., 589) depended upon the same principles with the case before us."

The same doctrine is held in *Pollard et al. v. Hagan* (3 How., 212).

It is approved by all of the court, from Chief Justice Taney to Judge Curtis, in *Dred Scott v. Sandford* (19 How., 490).

It is approved in *Woodman v. Kilbourne Manufacturing Company* (1 Abb. U. S., 162), opinion by Justice Miller, of the United States Supreme Court. *Columbus Insurance Company v. Curtenius* (6 McLean, 212).

This precise question, in the application to the State of Utah of a law of Congress which was not continued in force by any legislation, has been determined in *Moore v. United States* (85 Fed. Rep., 468).

The court were determining whether a law of Congress against unlawful combinations was in force in Utah, and held:

"By its terms the provision of the statute under which this indictment was found applies only to the Territories of the United States, and while it may yet be in full force within the Territories, it is clear that no prosecution could be maintained under it for entering into a combination or conspiracy in restraint of trade in Utah after the date of her admission as a State. * * * When Utah became one of the States of the Union, this statute ceased to be in force within its boundaries, unless, by appropriate legislation it was continued in force for the purpose of prosecuting violations thereof committed during the existence of a Territorial form of government. * * * The act of July 2 was not repealed by the enabling act, for it yet applies to the Territories of the United States. It ceased to be in force in Utah only because it was superseded by the constitution upon the admission of the State."

We have seen that there was no legislation of any kind continuing in force section 8 of the Edmunds Act, relating to disqualification. It is to be observed that this section does not undertake by its terms to operate within the limits of any State. It is expressly confined in its operation, by its terms, to "any Territory or other place over which the United States have exclusive jurisdiction." The meaning of the terms "polygamist" or "person cohabiting," with reference to the restriction as to voting, has been fully settled by the United States Supreme Court in *Murphy v. Ramsey*. (114 U. S., 39; 29 L. C. P., 47.)

This was an action for damages sustained by reason of being deprived, under this section, of the right to vote in the Territory of Utah, and among other things the court held:

"The requirements of the eighth section of the act, in reference to a woman claiming the right to vote, are that she does not, at the time she offers to register, cohabit with a polygamist, bigamist, or person cohabiting with more than one woman. * * * Upon this construction the statute is not open to the objection that it is an ex post facto law. It does not seek in this section and by the penalty of disfranchisement to operate as a punishment upon any offense at all. * * * The disfranchisement operates upon the existing state and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman. * * * So that, in respect to those disqualifications of a voter under the act of

March 22, 1882, the objection is not well taken that represents the inquiry into the fact by the officers of registration as an unlawful mode of prosecution for crime.

"In respect to the fact of actual cohabitation with more than one woman, the objection is equally groundless, for the inquiry into the fact, so far as the registration officers are authorized to make it, or the judges of election, on challenge of the right of the voter if registered, are required to determine it, is not, in view of its character as a crime, nor for the purpose of punishment, but for the sole purpose of determining, as in case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote. It is precisely similar to an inquiry into the fact of nativity, of age, or of any other status necessary by law as a condition of the elective franchise."

The principles which apply to eligibility as a voter must apply to eligibility to office, as they are in the same section and the same language is employed as to each, and in order to be affected by the disqualification prescribed by this section a person must be a polygamist or unlawfully cohabiting within the meaning of the section "at the time" of entering upon the office. It is not enough to show that at some former period Mr. Roberts was a polygamist or unlawfully cohabiting, as the disfranchisement does not operate "upon a past offense." It would have been entirely competent for Roberts to have taken himself from under the operation of this section while Utah was still a Territory, simply by ceasing to be a polygamist or cohabiting, or by moving into a State, as the "disfranchisement" operates upon "the existing state and condition of the person" only. In other words, the offense must be continuous. The offense and the disqualification are coterminous.

There is a further legal proposition, too well settled to require the citation of authority, and that is, no statute can operate, either directly or indirectly, extraterritorially. The statute in question does not undertake to.

The offense of polygamy and unlawfully cohabiting is localized by the statute. The provision is not general. No polygamist or person thus cohabiting "anywhere, without any restriction as to place," is not the language; on the other hand, the prohibition is confined to a specified locality. No polygamist or any person thus cohabiting—where? "In any Territory or other place over which the United States have exclusive jurisdiction." The United States had no power to make the prohibition apply to any other place, and did not attempt it. The offense and the place defined must coexist. He must be a polygamist or person unlawfully cohabiting in "any Territory," or the statute does not apply. The statute applies only to residents of the Territory.

In the light of these propositions let us analyze the case as it is.

Mr. Roberts presents himself as a Member-elect of this House. It is objected that he is disqualified under this section as a polygamist or person unlawfully cohabiting. The disqualification must exist at the time of his becoming a Member. But since January, 1896, he has resided in the State of Utah, and this statute has not since then operated upon him, and does not now operate upon him. It can not, therefore, now disqualify him. The conditions of offense and place required by the statute to coexist do not coexist in his case, and therefore the statute does not apply. In other words, it is said he is ineligible. Why? Because there is a statute of the United States which says that no polygamist or person unlawfully cohabiting in "any Territory" is eligible, and he is a polygamist or person thus cohabiting. It is a complete answer to say, "while I am a polygamist I am not such in any Territory."

While the penal provisions of the Edmunds Act are in full force in "any Territory," it would not for a moment be contended that Mr. Roberts would be liable to prosecution thereunder since January, 1896. Why? Simply because since that time he has committed no crime within "any Territory," as all of his acts have been in the State of Utah. A fortiori, the disqualifying provisions do not apply to him, as they do not even "operate as a punishment upon any offense at all." The moment Utah became a State he, living in Utah, became a resident of the State, and one of the indispensable elements of the condition to which the disqualification attaches—residence within "any Territory"—ceased to exist, and the disqualification ceased to apply. The offense of polygamy or unlawful cohabitation in "any Territory" and the disqualification were no longer coterminous. He is now doing no act in "any Territory" to which the disqualification applies, and therefore, as to him, it does not exist.

It is true that while Utah was a Territory Roberts was unlawfully cohabiting, and the disqualification existed, and his status was then that of ineligibility, and therefore, it may be suggested, it continues. But this would make the disqualification the result of a past offense, and the law says that it "operates upon the existing state and condition of the person and not upon a past offense." It does not "operate as a punishment" at all, all of which it clearly would do if the supposition were correct.

If the disqualification attaches to Roberts by reason of acts committed in Utah, the State, then the act would be operating extraterritorially, outside of "any Territory" to which by its specific terms it is expressly confined. The fact that Roberts still resides in the same place where he resided in 1895, though Utah is now a State, but then was a Territory to which the law applied, undoubtedly is the cause of some confusion of thought. It is clear that his legal rights are precisely the same as though since 1896 he had been residing in Maine, and had been elected to Congress from that State. It would not be contended that this act could have any application to him in such case to affect his present status, as it never operated there. No more has it in Utah since January, 1896.

It seems to us beyond question that this act does not now apply to Mr. Roberts. Then there is no law having any application to this case by which the attempt is made to add anything to the constitutional qualifications. This House, by its independent action, can not make law for any purpose. The adding by this House, acting alone, of a qualification not established by law would not only be a violation of both the Constitution and the law, but it would establish a most dangerous precedent, which could hardly fail to "return to plague the inventor." You might feel that the grave moral and social aspects of this case allowed you to

"Wrest once the law to your authority
To do a great right, do a little wrong."

But what warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House with other standards of morality and propriety, which will create other qualifications with no rightful foundations, that, in the heat and unreason of partisan contest—since there will be no definite standard by which to determine the existence of qualifications—will add anything that may be necessary to accomplish the desired result? Exigency will determine the sufficiency. It would no longer be a government of laws, but of men. To thus depart from the Constitution and substitute force for law is to embark upon a trackless sea, without chart or compass, with almost a certainty of direful shipwreck.

479. The case of Brigham H. Roberts, continued.

The question of loyalty as a qualification of a Member.

(b) By reason of disloyalty thus described by the majority report—

He is disqualified because for years he has been living in open, flagrant, and notorious defiance of the statutes of Utah and in open, flagrant, and notorious defiance of the statutes of Congress—of the very body which he now seeks to enter; in defiance of the law as declared by the Supreme Court of the United States, and in defiance of the proclamations of Presidents Harrison and Cleveland. He has persistently held himself above the law. This is disloyalty in its very essence. In the language of Chief Justice Waite, in the Reynolds case, this would in effect "permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

The majority say on this point:

The principles underlying the second main ground of disqualification, hereinbefore asserted, have already been fully discussed, but the ground is appropriately restated at this point.

We assert before the House, the country, and history that it is absolutely and impregably sound, not to be effectively attacked, consonant with every legislative precedent, in harmony with the law and with the text-books on the subject:

That Brigham H. Roberts's persistent, notorious, and defiant violation of one of the most solemn acts ever passed by Congress, by the very body which he seeks now to enter, on the theory that he is above the law, and his defiant violation of the laws of his own State, necessarily render him ineligible, disqualified, unfit, and unworthy to be a member of the House of Representatives. And this proposition is asserted not so much for reasons personal to the membership of the House as because it goes to the very integrity of the House and the Republic as such.

The minority do not specifically refer to this point, but discuss it generally in their treatment of the subject of qualifications.

480. The case of Brigham H. Roberts, continued.

A constituency having violated the understanding on which it came into the Union, was the status of a Member-elect thereby affected?

(c) Because, in the words of the majority report—

His election as Representative is an explicit and most offensive violation of the understanding by which Utah was admitted as a State. It is an act of unmatched audacity, the possibility of which could no more have been considered when the State of Utah was admitted than that a specific permission would have been given to renew the practice of polygamous marriages.

The majority say on this point:

Utah was admitted to the Union with the distinct understanding upon both sides that polygamous practices were under the ban of the church, prohibited and practically eradicated, both as a practice and a belief, and that they would not be renewed.

The effort is made to alarm people upon this proposition that some similar objection might be made to representation from States in which the claim might be made that the right to vote was denied to some citizens. It is a sufficient answer to this to say that if such ground of complaint exists the Constitution specifically tells us what our remedy is, and declares precisely in the fourteenth amendment what we may do in any event when the right of suffrage is improperly denied. There is no possible escape from that position, even assuming that there was anything in the bogie man.

But as to Utah, she was admitted on the express statement that the practice of polygamous living was interdicted by the church, was practically abandoned by the people and eradicated as a belief. Of course, that sporadic instances of the violation of the law against cohabitation might occur no one doubted.

The manifesto forbidding plural marriages and enjoining obedience to the laws relating thereto was issued by Wilford Woodruff, president of the Church of Jesus Christ of Latter-Day Saints, September 25, 1890.

Some doubt having arisen as to whether that manifesto prohibited association in the plural marriage relation, as well as the contracting of plural marriages as a ceremony, President Woodruff himself testified under oath as follows:

“Q. Did you intend to confine this declaration and advice to the church solely to the question of forming new marriages without reference to those that were existing—plural marriages?—A. The intention of the proclamation was to obey the law myself—all the laws of the land on that subject—and expecting that the church would do the same.

“Q. You mean to include, then, in your general statement the laws forbidding association in plural marriages as well as the forming of new marriages?—A. Whatever there is in the law with regard to that—the law of the land.

“Q. Let me read the language and you will understand me, perhaps, better: ‘Inasmuch as laws have been enacted by Congress forbidding plural marriages, * * * I hereby declare,’ etc. Did you intend by that general statement of intention to make the application to existing conditions where the plural marriages already existed?—A. Yes, sir.

“Q. As to living in the state of plural marriage?—A. Yes, sir; that is, to the obeying of the law.

“Q. In the concluding portion of your statement you say, ‘I now publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriage forbidden by the laws of the land’. Do you understand that that language was to be expanded to include the further statement of living or associating in plural marriage by those already in the status?—A. Yes, sir; I intended the proclamation to cover the ground—to keep the laws, to obey the law myself—and expected the people to obey the law.”

The significance of this statement by the spiritual head of the church is the more apparent when we remember that it was made but a short time before the question of the admission of Utah was debated in the House of Representatives.

Is it to be an occasion for wonder, therefore, that the proclamation of amnesty issued by President Harrison January 4, 1893, should contain these words:

“Whereas it is represented that since the date of said declaration the members and adherents of

said church have generally obeyed said laws and abstained from plural marriages and polygamous cohabitation; and

"Whereas by a petition dated December the 19th, 1891, the officials of said church, pledging the membership thereof to the faithful obedience of the laws against plural marriages and unlawful cohabitation, applied to me to grant amnesty for past offenses against said laws."

Is it strange that the House Committee on Territories in 1893 should report that "polygamy is dead?" And if that is not fully convincing, let the unprejudiced mind consider the following extracts from the debate in the House of Representatives on the admission of Utah, December 12, 1893: (Here the report quotes the debate at length.)

And so the enabling act was passed. Every incredulous Member who cast doubt upon the sincerity of polygamists in Utah was whistled down the wind. Every legislator who doubted if the funeral of polygamy had really taken place, was laughed to scorn. Polygamy was dead! That was the battle cry, and on it the battle was fought and won.

What would have become of the bill if Mr. Rawlins had declared that the State of Utah, just about to be born, would reserve the right to send a polygamist to Congress? His bill would have been buried beneath an avalanche of votes beyond the hope of resurrection.

The language of the enabling act is, "provided that polygamous or plural marriages are forever prohibited."

The understanding was that those words prohibited the practice of living in the status or condition of polygamous marriage.

Bouvier's Law Dictionary says:

"*Marriage*.—A contract made in due form of law by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. Marriage, as distinguished from the agreement to marry, the mere act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on themselves.

"'Marriage' is the legal status or condition of husbands and wives just as infancy is the legal relation or condition of persons under age. (1 American and English Encyclopedia of Law, vol. 14, p. 470.)

"The act of marriage having been once accomplished, the word becomes afterwards to denote the relation itself. (Schouler on Domestic Relations, 22.)

"Marriage is the civil status of one man and one woman united in law for life under the obligation to discharge to each other and to the community those duties which the community, by its laws, holds incumbent on persons whose association is founded on the distinction of sex. (1 Bishop on Marriage and Divorce, 3.)

"Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. (Hart's California Civil Code, 55.)

"Marriage is the union of one man and one woman so long as they shall both live together to the exclusion of all others by an obligation which during the lifetime the parties can not of their own volition or will dissolve, but which can be dissolved only by the authority of the State." (19 Indiana, p. 57.)

Senator Rawlins was asked before this committee the following question:

"Without reference to any assumed facts in this case, do you think that Congress would have admitted Utah to statehood if it had been predicted that Utah would send here in a few years a man as her Representative who was polygamously living with more than one wife?"

He answered: "I do not think the Congress of the United States would have admitted Utah if they at that time had believed that a revival of the practice of polygamy would occur."

It is not to be assumed from the fact that a rare or sporadic case of polygamous marriage occurred in Utah, or sporadic instances of unlawful cohabitation had come to light, that that would be a violation of the agreement; but we take it that it is in the last degree a violation of the agreement or understanding when that State sends to Congress a man who is himself engaged in the persistent practice of the very thing the abandonment of which was the condition precedent to its admission; and that man the most conspicuous defier of the law and violator of the covenant of statehood to be found in Utah.

As bearing on this, we here quote the manifesto issued a few days ago by the Mormon Church and presented by Senator Rawlins to the Senate:

"In accordance with the manifesto of the late President Wilford Woodruff, dated September the 25th, 1890, which was presented to and unanimously accepted by our general conference on the 6th of

October, 1890, the church has positively abandoned the practice of polygamy, or the solemnization of plural marriages, in this and every other State, and that no member or officer thereof has any authority whatever to perform a plural marriage or enter into such a relation. Nor does the church advise or encourage unlawful cohabitation on the part of any of its members."

In other words, the Mormon Church has left it to us and not to the church to say what shall be done with Mr. Roberts. Is the House of Representatives to respond in any uncertain tone?

The minority, in their views, say:

It is contended that if all other reasons assigned for exclusion are found to be insufficient, as we believe they are, still Mr. Roberts should be excluded, upon the alleged ground that, by virtue of the enabling act, a compact now exists between the United States and Utah which has been violated by the election of Roberts to Congress, and that the State can be in this manner punished for such breach of the compact. Compact is synonymous with contract. The idea of a compact or contract is not predictable upon the relations that exist between the State and the General Government. They do not stand in the position of contracting parties. The condition upon which Utah was to become a State was fully performed when she became a State. The enabling act authorized the President to determine when the condition was performed. He discharged that duty, found that the condition was complied with; and that condition no longer exists.

What did Congress require by the enabling act? Simply that "said convention shall provide by ordinance irrevocable," etc., and the convention did in terms what it was required to do. It was a condition upon the performance of which by the "convention" the admission of Utah depended. Its purpose accomplished, its office is gone, and as a condition it ceases to exist. No power was reserved in the enabling act, nor can any be found in the Constitution of the United States, authorizing Congress, not to say the House of Representatives alone, to discipline the people or the State of Utah, because the crime of polygamy or unlawful cohabitation has not been exterminated in Utah. Where is the warrant to be found for the exercise of this disciplinary, supervisory power? This theory is apparently evolved for the purposes of this case; is entirely without precedent; and has not even the conjecture or dream of any writer or commentator on the Constitution to stand upon.

In accordance with the facts and arguments as set forth in their report the majority recommended the following:

Resolved, That under the facts and circumstances of this case, Brigham H. Roberts, Representative elect from the State of Utah, ought not to have or hold a seat in the House of Representatives, and that the seat to which he was elected is hereby declared vacant.

The minority proposed as a substitute the following:

Resolved, That Brigham H. Roberts, having been duly elected a Representative in the Fifty-sixth Congress from the State of Utah, with the qualifications requisite for admission to the House as such, is entitled, as a constitutional right, to take the oath of office prescribed for Members-elect, his status as a polygamist, unlawfully cohabiting with plural wives, affording constitutional ground for expulsion, but not for exclusion from the House.

The resolutions were called up in the House on January 23, 1900,¹ and debated until January 25, when the question was taken on substituting the minority for the majority resolutions, and resulted—yeas 81, nays 244. The question then recurring on the adoption of the majority resolution, there were—yeas 268, nays 50. So the majority resolution was agreed to unamended.²

During the debate, on January 23,³ Mr. Roberts was permitted, by unanimous consent, to address the House.

¹First session Fifty-sixth Congress, Record, pp. 1072–1104, 1123–1149, 1175–1217; Journal, pp. 187, 192, 196–198.

²Mr. John F. Lacey, of Iowa, had proposed an amendment for expelling Mr. Roberts without swearing him in; but it was ruled out on a point of order as not germane. First session Fifty-sixth Congress, Record, pp. 1215, 1216; Journal, p. 196.

³Record, p. 1101.

481. The Senate case relating to the qualifications of Reed Smoot, of Utah, in the Fifty-eighth Congress.

Although it was understood that objection was made to a Senator-elect on the question of qualification, yet the oath was administered on his *prima facie* showing.

Form of resolution authorizing the investigation of the right and title of Reed Smoot to a seat in the Senate.

It was objected that Senator Smoot, by reason of fealty to a "higher law" than the law of the nation, was disqualified to hold a seat in the Senate.

Argument that expulsion applies only to acts of a Senator or Member done by him while in such office or in relation to his functions as such officer.

Contention that a Senator may be excluded for disqualification by majority vote, even though he may have been sworn in.

Discussion as to the right of the Senate to exclude by majority vote for lack of qualifications other than those enumerated in the Constitution.

Complaint in the Smoot investigation that the rules of evidence were not adhered to by the Senate committee.

On March 5, 1903,¹ at the special session of the Senate, and before the newly elected Senators had been called for the administration of the oath, Mr. George F. Hoar, of Massachusetts, was permitted by unanimous consent to make the following statement:

The chairman of the Committee on Privileges and Elections, the Senator from Michigan [Mr. Burrows], is obliged to be absent. He desired me to state in his behalf that he understands the orderly and constitutional method of procedure in regard to administering the oath to newly elected Senators to be that when any gentleman brings with him or presents a credential, consisting of the certificate of his due election from the executive of his State, he is entitled to be sworn in, and that all questions relating to his qualification should be postponed and acted upon by the Senate afterwards.

If there were any other procedure, the result would be that a third of the Senate might be kept out of their seats for an indefinite time on the presenting of objection without responsibility, and never established before the Senate by any judicial inquiry. The result of that might be that a change in the political power of this Government which the people desired to accomplish would be indefinitely postponed.

I make this statement at the request of the Senator from Michigan [Mr. Burrows].

The oath was then administered to the Senators-elect, among that number being Mr. Reed Smoot, of Utah, who took the oath without question.

On January 27, 1904,² the Senate agreed to the following resolution:

Resolved, That the Committee on Privileges and Elections of the Senate, or any subcommittee thereof, be authorized and directed to investigate the right and title of Reed Smoot to a seat in the Senate as Senator from the State of Utah; and said committee, or any subcommittee thereof, is authorized to sit during the sessions of the Senate, to employ a stenographer, to send for persons and papers, and to administer oaths; and that the expense of the inquiry shall be paid from the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

¹ Special session Senate, Fifty-eighth Congress, Record, pp. 1, 2.

² Second session Fifty-eighth Congress, Record, p. 1329.

The investigation continued during the third session of the Congress, and during that session the arguments¹ were made.

The investigation had shown that Mr. Smoot was an officer of the Mormon Church. No claim was made that he was himself a polygamist. Mr. Robert W. Tayler, who had conducted the presentation of the case against him, stated in his argument:

Now, gentlemen, this is the broad claim we make: That the church is in fact higher than the law; that the hierarchy and its members are in fact higher than the law. I do not mean that they consciously realize that in every act that they perform they are above the law, or that they do not quite unconsciously generally obey the law, as most men obey it, but that after all when we get to the inner consciousness that controls them they are obedient to a higher law, and they are so, because as I indicated incidentally earlier in my argument, they or it receive revelations, because its membership, especially the hierarchy, are in immediate contact with God. I shall have more to say about that as we go along. This is basic. I should like that every word I say from now on should be considered in view of the fact and with constant apprehension of the fact that revelation runs through the Mormon mind and is the basis of the Mormon religion and of its hold on the Mormon people to-day—revelation by actual contact with the Almighty.

In that thought we discover the explanation of everything that has happened. The defiance of law, not because it was law—that is, the law of the land—not because it was the law of the land, but because there was a law of God that was higher than the law of the land; the constant defiance of the law of the land, from Independence, Mo., in 1836 to 1840, down to the present hour, all are due not to lawlessness, but to the fact that there is a higher law that speaks to them.

So, also, from this spirit of authority growing out of revelation, and without that they had not the right to do it, we know of their institution of courts, sometimes and in some regions exercised more generally than in others, but absolutely exercised, as we know by the official records of the case.

Now, all these things involve and determine Senator Smoot's status, and I am now only outlining the claim as to him.

First, in his attitude toward revelation, to which I have already made reference, and to which the order that I have in mind to pursue will make it necessary for me to refer again.

Second. His integral partnership in the hierarchy. He is not an independent person. No individual member of the hierarchy is independent. They are a unit. But of that I will speak further on.

His acts of omission and commission. Different views will be taken as to the extent of his duty, as well as of the extent of his power. But we do know what his relation is and was to the Cluff incident—the president of the Brigham Young University, an institution in which there were a thousand young people of both sexes—wherein Senator Smoot, a trustee and member of the executive committee, if he did not have knowledge, said he had reason to believe that the president of that institution was not only a polygamist, but that he had taken another plural wife, the daughter of a high official of the church, as recently as 1899, and he permitted him—that is to say, he made no objection, and made no investigation—this new polygamist, as well as old polygamist, to remain at the head of that institution, and then when he retired he voted or consented to, and now approves of, the election of another polygamist in his place; his participation since this case commenced in the election of Penrose, a polygamist, to the apostleship to succeed one who was not a polygamist; his relation to Joseph F. Smith, whom he voted to make the president of the church, and whom he has sustained regularly ever since, and also the other apostles.

Next, his determination not to interfere with polygamists, his statement not only that he has not complained of it, that he has not disapproved of it, that he has not criticised his associates in the hierarchy, but also that he will not, and does not intend to, speak to them or to take any steps toward seeing that they, his associates in this close institution, should either be prosecuted or disciplined in the church, whose rules they violate.

His attitude with respect to this endowment ceremony, his refusal to disclose what it was, and his statement made here in the presence of this committee that he could imagine nothing that could induce him to reveal it, not even the Senate, not even the courts, not even the power of the law.

¹ See arguments in the Smoot case, Washington, Government Printing Office, 1905.

Mr. Tayler then proceeded to discuss the method of reaching Mr. Smoot:

I do not need to say to this committee that the power of the Senate on any subject within its general scope is exceedingly broad. There is no limitation upon its power except that which the Constitution imposes, and the Constitution imposes very few limitations. It imposes absolutely no conditions upon the power of the Senate respecting the matter of the elections, returns, and the qualifications of its members. It is the sole judge of all questions which, within the Senatorial mind, may be encompassed within that inquiry. It does limit the power of expulsion by requiring that two-thirds of the members shall concur in such a motion. The constitutional provision giving the power to expel is very peculiar, and has given rise to much discussion since the institution of the Government. I myself have very decided convictions upon the meaning of that provision, and I do not think there ought to be any great difficulty in construing it. The language is:

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

Now, if we construe that according to the ordinary rules which apply to the construction of the English language, we of course take it all together. The context relates to the words "with the concurrence of two-thirds expel a member;" and I have always assumed that the power to expel referred to that conduct which the Senate could carry on respecting a member who had a right to be there, whose title there was unquestioned, and for something that he did, or for some status in which he was while a Senator. I think that is the only sound construction of that clause in the Constitution. It has never had another construction, in fact, by the acts of the Senate.

No Senator has ever been expelled, no Member of the House has ever been expelled, except for some act done by him while a Senator or Representative, or relative to his functions as a Senator or Representative; and I think no serious effort was ever made to expel for any other reason than that.

In the present case the power of expulsion could be invoked, because the claim is made that the status of Senator Smoot, his relation to this law-defying hierarchy, his own attitude toward law, the view that he takes of his capacity to receive revelations from Almighty God, all indicate a present status that, if necessary, brings it within the power of the Senate to expel. But if what I have said concerning Senator Smoot be true, that status and that state of mind—that personal relation that he must sustain, if he understands himself, to law and respect for law—of course preceded his entrance into the Senate and is a part of his constitutional temperamental make-up.

The broad power of the Senate is that it is the judge of the elections, returns, and qualifications of its own members. We have heard a good deal of talk about the Constitution making three qualifications for membership in either House; that one must be an inhabitant of the district from which he is elected; that he must be a citizen of the United States, and must be of a certain age. That is true. Those three things must exist.

Beyond that legislation is vain. Congress can add no qualifications, can take none away, for one Congress can not limit the power of another Congress. The Constitution has done the limiting. But that is very far from denying that under the constitutional power of each House to be the judge of the elections, returns, and qualifications of its members either House may not upon proper occasion define and declare ineligibility or disqualification in one who seeks to enter the body, or who, having entered it, is charged with want of eligibility or qualification. That occurs constantly in the House, where elections are contested for various reasons—sometimes for invalidity in the election itself; sometimes for want of qualification in the elected himself. But always the question is answered by the House to which it is put, controlled only by the general provision of the Constitution that makes it the judge.

Suppose it were true that Senator Smoot was a polygamist? If a polygamist, he would have no other relation to his seat—he could not be looked upon by the Senate in any other light—than as a lawbreaker or as a defier of law. So, continuing the use of that expression, if Senator Smoot were in law to be defined as a lawbreaker, or a defier of law, what would be the duty of the Senate? What would he be? Would he be merely the subject of expulsion, assuming this defiance to have continued, to have commenced back of his election, back of his entrance into the Senate, the condition that exists now being a condition that antedated his entrance here? The acts that he thus committed, the status that he thus sustained toward law, would, according to my view of it, render him ineligible to become a member of the legislative body. I do not think that any man who came marching down the aisle of the Senate to be sworn in, proclaiming himself a lawbreaker, if that were possible, would have the right to be sworn in, or, being sworn in, could not be ejected by a majority vote. The Senate would

be the judge of the qualifications of its members; and it would say then, as the House has said in more cases than one, and which neither body has ever declared that it had not the right to say, that the time to settle that question was when he thus presented himself.

Senator BEVERIDGE. You asked for interruptions from members of the committee?

Mr. TAYLER. Yes.

Senator BEVERIDGE. Do I understand your contention at this point to be—and I imagine it is very important—that if Senator Smoot is not legally a member of the Senate, then a majority of the Senate may determine. If he is legally a member of the Senate, then all questions affecting his expulsion would require two-thirds. Is that the contention?

Mr. TAYLER. No, not exactly, Senator. When one is sworn in, no matter what may be the infirmity in his title as later developed by testimony, he has his seat. He is a Senator.

Senator BEVERIDGE. He is a member?

Mr. TAYLER. He is a member; but the same cause that would justify his exclusion, if all the facts were known and the Senate in full knowledge of its power had acted before he took his seat, will suffice to exclude him or declare his seat vacant by a majority vote after he has taken his seat.

Senator BEVERIDGE. In other words, if these facts had been known at the time and the contest had been raised before he took the oath, it is conceded that under such circumstances a majority would have been competent to act. Now, if those facts are developed later on, do you contend that although he is a member technically, nevertheless a majority still is competent to act?

Mr. TAYLER. Undoubtedly. The House does it every session. Suppose it should appear today that Senator Smoot was not a citizen of the United States, his seat could be declared vacant by a majority vote. Expulsion would not be the method.

Senator BEVERIDGE. That notwithstanding the fact that he is technically a member—

Mr. TAYLER. Actually a member.

Senator BEVERIDGE. Let me state my question.

Mr. TAYLER. Yes.

Senator BEVERIDGE. The two-thirds rule does not operate. Is that your contention?

Mr. TAYLER. Undoubtedly.

Senator BAILEY. Permit me to interrupt you here. The qualifications which the two Houses are authorized to judge of are the qualifications laid down in the Constitution. In other words, the Constitution provides that "no person shall be a Senator who shall not have attained to the age of 30 years and been nine years a citizen of the United States, and who shall not when elected be an inhabitant of that State for which he shall be chosen." As I have always understood it, that provision fixes the qualifications of a Senator, and it is not competent either to add to these qualifications or to subtract from them and that when the two Houses are authorized to judge of the elections, returns, and qualifications of their members, it has reference to the questions of age, citizenship, and residence within the State.

Mr. TAYLER. No. If there is any subject upon which I have a decided conviction it is on that—that the constitutional provision does not confine the inquiry of either House to the question as to whether the member is qualified in the three respects which the Senator from Texas has suggested.

Senator BEVERIDGE. Then why did the Constitution enumerate those? If the Constitution leaves it open for either House to determine something in addition to those, why did it enumerate these at all? Why did it not leave it all open?

Mr. TAYLER. That is a long argument. But, for instance, the Constitution does have other qualifications. Although it proceeds to set out in the first section that Representatives and Senators shall have attained a certain age, and have qualifications with respect to citizenship and inhabitance, yet the Constitution in other places shows that those three were not intended to be the only qualifications required. For instance, it says that no test oath shall be required. Why should the Constitution have such a provision in it if it had already exhausted the subject?

Senator BEVERIDGE. If the Constitution leaves it open with reference to other qualifications than those enumerated, and which have been read, why did it not leave it open with reference to all the qualifications if it meant that either House might enlarge upon the qualifications which have just been read?

Mr. TAYLER. My answer in the first place is that it did not do that. It goes on to say in another part of the Constitution that some other certain things shall not be required to qualify a person to become a member of either House.

Senator BEVERIDGE. Adding those things specifically enumerated elsewhere in the Constitution to these, the question still is, Why, if the Constitution enumerates some things and meant to leave other things open to the sense of the Senate, it should have enumerated any?

Mr. TAYLER. I think I have answered it by saying—

Senator BEVERIDGE. All right.

Mr. TAYLER. It proceeds to enumerate the three different qualifications upon which it is said we ought to base our argument, and we find that twice thereafter, once with respect to holding other offices and once with respect to taking an oath, it did not do so. I do not think the Constitution is to be construed as though men wanted the Senate of the United States or the House to be bound in some Procrustean bed that would not permit it to live. Is it not an institutional question that the body should have some control over the subject of its membership?

Senator BEVERIDGE. It may be.

Mr. TAYLER. Suppose that a maniac walked down the aisle to be sworn in. Suppose he was there. Suppose it was not a case of expulsion at all. Suppose that he was a traitor, known to be a traitor, with respect to whom it had been determined within the constitutional method that he was guilty of treason. Is it to be said that, although he possessed every constitutional qualification, nevertheless he is not disqualified to be a member of the Senate?

Senator BAILEY. You do not mean to say that the Senate could not protect itself in a case of that kind without raising the question of qualification, as we understand it in the Constitution?

Mr. TAYLER. I do not know how it could.

Senator BAILEY. It could expel him provided it could obtain the two-thirds.

Mr. TAYLER. Of course it could. But why should it require two-thirds of the Senate to keep out a maniac or a traitor?

Senator BAILEY. And it could expel him as being unfit for or incapable of performing the duties of his office. But I will ask you this question: Do you think that Congress could provide that hereafter no person shall be chosen a Senator who had ever been convicted or who had ever been accused of any crime?

Mr. TAYLER. No. Congress is absolutely without power—

Senator BAILEY. It, then, could not by statute add to those qualifications?

Mr. TAYLER. Not at all.

Senator BAILEY. But it can by a vote—

Mr. TAYLER. Of course not Congress, if the Senator please, but the House into which the Member comes; each House, but not Congress.

Senator BAILEY. You think it would be competent for one House to establish with respect to its Members a rule of exclusion that the two Houses could not establish by law?

Mr. TAYLER. Undoubtedly, because when the Senate, for instance, establishes a qualification for its Members it establishes it for that Congress alone—that is to say, for that session, for that Senate.

Senator BAILEY. Is it not compelled to establish those qualifications under the constitutional provision under the protection of which every man comes to the House or the Senate?

Mr. TAYLER. Undoubtedly.

Senator BEVERIDGE. Narrowing the question from Congress to either House, it is competent for the Senate to make rules, which it does respecting many things. It is competent for the Senate to pass a rule for its own government and guidance that no man who has ever been accused of any crime shall be permitted to take the oath?

Mr. TAYLER. The Senate whose term expires on the 4th of March has no more power to control the action of the Senate that begins on the 4th of March than I have— not a particle more.

Senator BEVERIDGE. The Senate is a continuing body.

Mr. TAYLER. I understand it is a continuing body.

Senator BEVERIDGE. Is it not like the House.

Mr. TAYLER. But the next Senate can undo that.

Senator BEVERIDGE. There is no next Senate. The Senate is a continuing body.

Mr. TAYLER. I understand that.

Senator BEVERIDGE. To narrow the question put to you, do you think it is competent for the Senate to establish such a rule, and that it would be effective while it lasts?

Mr. TAYLER. Undoubtedly, because when that rule was not overthrown by the succeeding Senate

it would continue by implication to be its rule. But the Senate can not make a rule to-day which it can not undo tomorrow. It can not make a rule now which it can not undo at 1 o'clock on the 4th of March. It is not law. Of course the two Houses can not pass laws laying qualifications, because the two Houses have no power at all over the constitution of the membership of succeeding Congresses except as to the number. But each House is in control of the subject of its own Members.

Senator PETTUS. Mr. Chairman, I most respectfully ask that this argument may be allowed to be made by counsel. We can get no benefit if it is to be a debate between the members of the committee and the counsel on the floor. There are places where counsel are not allowed to make their arguments to the court, but must make it with the court. Whenever counsel gets in that fix he is in a bad situation.

Senator BAILEY. It may be that some members of the committee are entirely satisfied without having their minds enlightened. I do not happen to be one of that kind.

I really am trying to ascertain just how far we can go, and my opinion was not that of the counsel, and I thought if the counsel could convince me that on the question of qualifications we could proceed outside of the Constitution it might make a difference in my opinion.

But I will conform to the wishes of my senior, with this statement, that when counsel replied to me that the Constitution treated these as not the only qualification and then provided that no test oath should ever be required, Mr. Tayler will, of course, recognize that that did not apply merely to Members or Senators. It applied to everybody, and therefore could not have been incorporated in the provision with respect to Senators. It declares, toward the end of the Constitution, that—

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States."

It looks like that did not exactly make a qualification, but excluded a disqualification.

The CHAIRMAN. The Chair will state that Mr. Tayler at the outset—possibly the Senator from Alabama was not then here—invited interruptions upon any point where members of the committee might desire further explanation, and the Chair thinks interruptions were entirely in order. Of course, if they were continued, they might consume the entire hour. But with that the committee has nothing to do; and it certainly will serve to enlighten the committee upon these points about which there may be an honest difference of opinion.

Senator BEVERIDGE. I should like to state, if I may, before Mr. Tayler proceeds, that Mr. Tayler asked the members of the committee specifically to ask any questions, and said he did so because he thought it would tend to clarify the case and save time. I think, so far as I am concerned, I shall have no other questions to ask Mr. Tayler.

Mr. TAYLER. Of course it has given me pleasure to be interrupted. There is no subject that I should like to talk on more than the one about which I have just been inquired of, because there is not any subject on which I have talked as much as I have on it.

Senator BAILEY. I remember that question was up when we were both Members of the House.

Mr. TAYLER. Yes, sir.

Senator BAILEY. I did not agree with you then.

Mr. TAYLER. I recall the fact.

Senator BAILEY. And I voted the other way.

Mr. TAYLER. I was not surprised at the question of the Senator from Texas, for I knew that he did not agree with me at that time.

I may, perhaps, ask the indulgence of the committee, in view of these questions, that I may, in my argument as printed, elaborate this question by making some extracts from a very full discussion of it which is in the argument that I made in the Roberts case. Perhaps, historically, it would be better that it be inserted.

Senator FORAKER. I wish to make a remark at this point, not to interrupt you or unduly take the time of the committee. I understand your proposition to be that, notwithstanding the grounds of disqualification enumerated in the Constitution, if when a Member has been elected and presents himself to be sworn in it be manifest that he is a maniac or a lunatic, he may be, on that ground, excluded?

Mr. TAYLER. Yes.

Senator FORAKER. For want of qualification?

Mr. TAYLER. For want of qualification or for a crime. My argument in the Roberts case cites a large number of constitutional authorities on that proposition.

Senator KNOX. In order to get your view absolutely I think there should be added to the question of Senator Foraker this: By what vote may he be excluded?

Mr. TAYLER. By a majority vote.

Senator BEVERIDGE. That is, in the case you have stated, when he presents himself?

Mr. TAYLER. Yes.

Senator BEVERIDGE. Suppose later on it should develop that he is a lunatic?

Mr. TAYLER. Of course, if we consider that for a moment the logical and inevitable conclusion from it is that that which may be done before one enters may be done after he comes in. That which justifies exclusion before getting rid of him afterwards.

Senator BEVERIDGE. By the same method?

Mr. TAYLER. By the same vote; by the same method.

Senator BEVERIDGE. My mind does not follow that.

Mr. TAYLER. Just as is done in the House.

Senator FORAKER. That is, his position would not be bettered any, your contention is, by having been given his seat?

Mr. TAYLER. Not at all. The question of right in him and of power in the Senate is precisely the same in either case. Of course if the thing complained of occurred after taking his seat, then it would not be a case of exclusion, but of expulsion.

Another observation on that which I leave with the committee to work out in its own way is that which was made by Jeremiah Wilson, who was the counsel of the Mormon Church and appeared for it in many of its cases. He made an especially full and able argument in one of the applications made by Utah for admission. This pamphlet is entitled "Admission of the State of Utah, 1889," and in connection with the hearing a large number of people bore testimony or made arguments, and among those who made arguments was Jeremiah M. Wilson. The subject of obedience to the constitutional provision that was to go in was up. This is not exactly that, but it is analogous to it. He then said—

The CHAIRMAN. May I call your attention to the case of Philip F. Thomas?

Mr. TAYLER. I have it here.

The CHAIRMAN. It is found on page 133 of the Compilation of Senate Cases. There a party was excluded because his son had taken up arms against the Government of the United States, and the party seeking admission to the Senate had contributed \$100 in support of his son and in encouragement of his entering the rebellion. The Senate refused to admit him. You will come to that later?

Mr. TAYLER. I will refer to it right now. Philip Thomas had been elected to the Senate from Maryland, and there was a very elaborate debate in March, 1867. The charge made against him was that he was disloyal, and therefore incapable of taking the test oath which had been provided in the act of July, 1862. A resolution was then adopted and under the provisions of it he was excluded from the Senate because he had voluntarily given aid, countenance, and encouragement to persons engaged in rebellion. The vote on the question of his exclusion was 27 to 20. Among those voting in the negative was Lyman Trumbull, but he voted in the negative because he thought the proof of disloyalty was unsatisfactory.

The CHAIRMAN. The evidence in the cause of Thomas was that his son had entered the Confederate service, and his father had contributed \$100.

Mr. TAYLER. I do not attach so much importance to those cases growing out of the war as I do to those which came under circumstances when passion was less effective in dispelling reason.

Senator FORAKER. In the Thomas case he was denied his seat.

Mr. TAYLER. Yes; he was denied his seat.

Senator FORAKER. He was not allowed to take his seat?

Mr. TAYLER. He was not allowed to take his seat.

Senator BEVERIDGE. He was not expelled. He did not become a Member.

Mr. TAYLER. My contention is that the Senate does not lose its rights because a man happens to get in whom it might have excluded for conditions existing prior to that time. If ineligibility or other cause that justified his exclusion existed, the same method and the reason would apply after he got in.

The CHAIRMAN. There was no question in the Thomas case that he was of a proper age, a citizen of the United States, and a resident of the State. He had all the enumerated constitutional qualifications.

Mr. Waldemar Van Cott, arguing for Mr. Smoot, discussed this subject:

The contention has no merit that Senator Smoot is subject to be expelled by a majority vote.

The Federal Constitution, Article 1, section 4, provides "Each House may * * * with the concurrence of two-thirds, expel a Member."

To give proper meaning to the above provision, it is best to inquire as to the motive that induced the constitutional fathers to insert this clause. In those early times there was considerable jealousy among the different States—that one State should not gain an advantage over another in the matter of representation; in other words, each State wished to protect its rights in the National Government, and to accomplish that end insisted upon a two-thirds vote to expel. If the provision had been that a majority might expel, then the States might the more easily be deprived of their representation, as combinations, corrupt or otherwise, could be formed to expel a member. A majority vote might be successful, while a two-thirds vote would probably be unsuccessful. Therefore, it is reasonable to assume that the two-thirds rule was inserted in the Constitution so as to guard the more carefully each State's representation. This idea has been expressed by the Supreme Court of the United States. In *6 Wheaton*, 233, *Anderson v. Dunn*, it is said:

"The truth is that the exercise of the powers given over their own Members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a Representative would indirectly affect the honor or interests of the State which sent him."

From the above quotation it is apparent that the States were jealously guarding their honor and interests by providing that their Representative should not be expelled without the concurrence of two-thirds of the Members of the House in which he was sitting.

In *1 Story on the Constitution*, section 837, in speaking of the power to expel, it is said:

"But such a power, so summary, and at the same time so subversive of the rights of the people, it was foreseen might be exerted for mere purposes of faction or party to remove a patriot or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction that there shall be a concurrence of two-thirds of the Member to justify an expulsion."

This subject is very fully discussed in *1 Story on the Constitution*, sections 837 and 838. They are too long, however, to quote in full.

Justice Story refers with approval to the case of John Smith, Senator from Ohio, decided in the United States Senate. This case will be found in the compilation of Senate election cases, from 1789 to 1885, page 934. This case is exactly in point. John Smith was elected Senator from Ohio from October 25, 1803, until he resigned, April 25, 1808. In the statement it appears that certain bills of indictment were found in connection with the Aaron Burr conspiracy in the August before John Smith took his seat in the Senate, the latter date being October 25, 1803. The case is very lengthy. There was a long debate on the resolution to expel. Nineteen voted to expel and ten not to expel, and the syllabus of the case says: "* * * so that, two-thirds of the Senate not concurring therein, he was not expelled." It will be observed that if a majority had been sufficient, John Smith would have been expelled. This case was decided in the Tenth Congress, first session, in 1808.

Keeping carefully in mind the reason for the constitutional provision, it is apparent that it is just as logical to require a two-thirds vote to expel a member for a crime that was committed before taking his seat as there is for a crime committed after taking the seat.

Suppose A commits an offense against the laws of the United States after his election to the United States Senate. In such case Mr. Tayler concedes that it would take a two-thirds vote to expel. Suppose, on the other hand, the same Member had committed the same offense before taking his seat. In that case Mr. Tayler argues that such Senator might be expelled by a majority vote, because the objection existed at the time of taking the seat. The only difference in the two cases is time; there is no difference in reason.

There is a substantive difference between a constitutional ineligibility on the part of a man to be a United States Senator and a mere personal objection, and the two principles should be kept distinct in the mind. Suppose A is elected to the United States Senate and is not a citizen of the United States. In that case there is a constitutional ineligibility. Such person may take the Senatorial oath and take his seat, yet it is evident that such person, while he may be for the time a Senator *de facto*, he is not

a Senator *de jure*, because he has not the necessary requirements. In such case it appears entirely reasonable that a majority vote could oust him.

But suppose A is constitutionally eligible to be elected a United States Senator, and is so elected. Further, suppose that A at the time of the election has such personally offensive habits as to be intolerable to decent men. Nevertheless, suppose A presents himself to the United States Senate and takes the oath and enters upon the performance of his Senatorial duties, and then these intolerably offensive habits are discovered. In the latter case the objection to A existed at the time of his election. Who, except Mr. Tayler, would contend in such case that A could be expelled by a majority vote? The constitutional reason that a two-thirds vote shall be required to expel a member applies with full force in such case; in the latter instance the Senators may waive or not the objection to the personal habits of A. Under the Constitution, however, they would not have the power to waive A's constitutional ineligibility, as this in effect would override the Constitution.

Senator Smoot was constitutionally eligible to be a United States Senator at the time of his election. When he took the oath of office and entered upon the performance of his official duties he was still eligible under the Constitution. In argument, however, an objection is made to Senator Smoot for one alleged reason. Even if it were established as true, the United States Senate has the power to ignore it, and to allow Senator Smoot to retain his seat. The United States Senate may do this because it has the power to pass on the qualifications of its own members; but if Senator Smoot were not a citizen of the United States the Senate would not have the power to waive that requirement, and could not waive it, unless it should arbitrarily override the express provision of the Constitution.

Mr. A. S. Worthington, also arguing for Mr. Smoot, said:

I would like to say, as preliminary to the argument in this case, that I have been greatly impressed with the contrast between the proceedings in the case when an officer of the Government is to be impeached by the Senate, or before the Senate, even though he may be an officer so comparatively unimportant as a district judge of the United States, and the proceedings which are provided in case one who is a member of the highest legislative body of this great nation is called to an account. When a district judge is impeached there is a carefully prepared indictment, setting forth exactly what he is to meet, and that he is called to respond in the Senate of the United States, with his counsel, and there the witnesses are heard before the assembled Senate, the presiding officer, as he did the other day, carefully reminding Senators that it is very important that they should all be present and hear the testimony and see the witnesses. And I see that you have carefully provided rules for the conduct of such an investigation as that, and have provided that counsel may be there to make objections, and that if any Senator wishes to ask a question he shall reduce it to writing and it shall be handed to the presiding officer and asked by him; and that if any objection is made to testimony, while the presiding officer shall rule upon it in the first place, it may, upon his motion, or upon the request of any Senator, be submitted to the entire Senate.

Yet, in the case in which a Senator is to be visited, if he be found guilty, with punishment like that which shall be inflicted upon the judge, of being turned out of his office, we find that we are here, as we found, and as Senators have found during the progress of this case, compelled to scramble through a record of nearly three thousand printed pages to find out what the issues are which we are trying, and that, in all probability, if every member of the committee should be asked the question, no two of them would agree as to precisely what the issues are. And we find that, while the testimony has been taken and reduced to print, the great mass of it has been heard by very few Senators, and that even on one occasion there was but one Senator present, the distinguished chairman of this committee, and when he was called out of the room for a moment, he intimated that we might go on in his absence, which we did not do.

I make this suggestion in no spirit of complaint or fault-finding, but as bringing to the attention of the committee, and I might hope of the Senate, a question of importance, not only in the determination of this case, but of all like cases hereafter, because Senator Smoot is to be tried and his case decided by a tribunal not one-tenth of which has seen any of his witnesses or heard any of them testify. We all know how exceedingly important it is, in determining what weight shall be attributed to the testimony of a witness, to see him and to hear him. I have in mind some witnesses in this case whose testimony reads as though it might be credible, when I do not believe any Senator who heard the witnesses would believe them for a single moment.

The slightest examination of the record will also show that, unlike, I should suppose, the proceedings in the impeachment of a judge or other officer of the United States, we are practically without rules of evidence, because, as was stated several times in the progress of the case, this is not a trial at all, but an investigation, and the committee has the right to inquire for hearsay evidence, because A may tell that B told him something, and B may say that he got it from C, and so we may lead to the original evidence. When my associate undertook to argue that in that way the record would be filled with matter which might come before members of the Senate who are not lawyers and who would not be able to distinguish between legal and illegal evidence, we were told that was a matter which had become so well settled in the practice of the Senate that we would not be allowed to further argue it.

So that we are here before a great tribunal in which a defendant is called upon to respond to charges so serious that they may evict him from the Senate of the United States—and no greater punishment could be inflicted upon an honorable man, a man with any sense of the proprieties or honors of life—and his counsel are called upon to argue the case for him, upon a record which contains evidence nine tenths of which we believe is not competent and may not be considered, and yet we do not know what may be in the minds of even members of the committee on that subject, much less in the minds of other Members of the Senate who probably have not yet considered it.

Under all these difficulties I proceed to consider the questions which seem to arise in the case, guessing as to some of them and having probable ground as to the others.

Now, in the first place, and at the forefront of this case, there lies a question, which even if I had had the time to prepare for it, I should doubt my ability to properly present it to such a tribunal as this, and I am going to say very little about it in this argument, and that is the question which arises as to the grounds upon which Senator Smoot may be expelled from the Senate at this time, he having been duly admitted to office, and having been sworn in and taken his seat, and as to the grounds in any case, whether they be made as an objection before a Senator is sworn or after he is admitted, upon which the Senate would proceed.

Of course it has the power to proceed upon any ground, but we all assume, as has been done here so far in this discussion, and everybody will assume that the committee and the Senate will act judicially in the matter, and not arbitrarily.

The whole learning on this subject, so far as I have been able to ascertain, is gathered up in two places. One is where my friend, Mr. Tayler, as the chairman of a special committee of the House of Representatives, investigated the question of the right of Brigham H. Roberts to a seat in the House of Representatives, where there was a majority report and a minority report on the questions that were involved there. With that you are all familiar.

There is another case with which Senators may not be so familiar, because it has not found its way into the compilation which I have seen, and that is the case of Roach.

Roach was at one time the cashier of the Citizens' Bank of this city, and it was charged, and apparently never denied, that he had embezzled, while cashier, about \$30,000 of the bank's money. His friends or relatives settled with the bank and he was never prosecuted. He went to North Dakota, and after a while he came back as a Senator from that State and was admitted and took his seat without objection. Afterwards, in some way, the question was raised that he should not be entitled to his seat, and great discussion took place then as to whether it was a case in which the Senate had any power to act at all, because it was a crime that he had committed before his election.

That matter was discussed by the leading lawyers of the Senate on both sides, and all the authorities were gone over there, with the result that a resolution to refer the matter to the Committee on Privileges and Elections was never passed upon at all, and he served out his term. (Vol. 25, pt. 1, Cong. Rec., 53d Cong., special sess., pp. 37, 111, 137 to 162.)

I would also like to refer for just one moment to the celebrated case in England of John Wilkes.

Many years ago Wilkes, while a member of the House of Commons, libeled the King and was expelled from the House of Commons for that offense. His constituency immediately reelected him, and the House refused to receive him on the ground that a man who had been expelled was not a fit man to sit there. His constituency sent him back once more, and again the House refused to receive him; he was again sent back, and again the House refused to receive him. So it went on, as I remember, for about fourteen years, when at last the House came to the conclusion that his constituency had a right to be represented in the body, and he was admitted to his seat. Thereupon annually for several

years afterwards he moved that all the previous resolutions of the House to the effect that he was not entitled to have a seat therein should be expunged. Finally that motion was carried; and the clerk of the House, on its table and in the presence of the assembled House of Commons, expunged all the previous resolutions to the effect that a member who represented his constituency could be expelled from his seat because the House at some prior time had adjudicated him to be unfit for his seat. As the resolution of expulsion expressly stated, this was done, not because the orders of the House which were obliterated were in derogation of the rights of Wilkes himself, but because they were "subversive of the rights of the whole body of electors" of England. (Paine on Elections, 872-878.)

And I ask this committee to remember that you have here not merely the question of whether Reed Smoot shall be entitled to retain his seat, but as to the right which a sovereign State—Utah—has in the selection of persons to represent it here, and whether it may be said that for causes which lie back of his election and which were known to his constituents, he shall be expelled.

If Mr. Tayler's present contention on this point should be sustained it would come in the end to this, that instead of the States of this Union having the right to select the men to represent them in the United States Senate they would have the right merely to nominate candidates for the office, who would be admitted only after obtaining the advice and consent of those who were already here.

There is one case, too, in this country to which I wish particularly to direct the attention of the committee. That is the case of George Q. Cannon, a polygamist, who, while a polygamist and living in polygamy, was sent to the House of Representatives as the Delegate of the Territory in the House, and attention being called to the fact that he was a polygamist, it was undertaken to expel him on that ground. The House, by a very large majority, a very few Members voting to the contrary, decided that notwithstanding he was a polygamist and was living in polygamy, the fact that he had been admitted to a seat and was sitting there precluded the House from taking any action in reference to expelling him. That is all set forth with great strength and with approval by Mr. Tayler in the Roberts case, as affording an instance of the danger of letting Roberts take his seat, because then there could not be taken into consideration anything that had happened before his election, and it would require a two-thirds vote to expel him instead of a vote of the majority only.

Mr. Tayler has suggested and argued here that a majority vote only could be required on the ground that the question is as to the qualifications of Senator Smoot, and that you can take into consideration other qualifications than those fixed by the Constitution itself. But when he came to his argument, he urged that you should not allow Reed Smoot to take his seat because of things that have happened since he took his seat—not since the election merely, but since he took his seat, aye, since this inquiry began; and perhaps the part of his argument upon which he laid the most force and strength was that since this investigation began, and since Senator Smoot learned certain things from the testimony of witnesses here, he had not done certain things.

Now, it would be a remarkable thing if this committee of the Senate should come to the conclusion that when the State of Utah selected this man as one of her Senators, and when the Senate admitted him to his seat, he was not qualified, and established it by facts that have happened since he came into the Senate.

No report on this case was made by the committee during the Fifty-eighth Congress.

482. Senate case of Reed Smoot, continued.

While a majority of the Senate committee agreed that Reed Smoot was not entitled to his seat, they could not decide whether he should be excluded or expelled.

Consideration of the qualifications, the lack of which may render a person unfit to remain a member of the Senate.

Summary of protest against Reed Smoot as a Senator and his answer thereto.

A majority of the Senate committee considered Reed Smoot's membership in a religious hierarchy that countenanced and encouraged polygamy a reason for removing him from the Senate.

Reed Smoot's membership in a religious hierarchy that united church and state contrary to the spirit of the Constitution was held by the majority of the Senate committee a reason for vacating his seat.

Convinced that Reed Smoot had taken an oath of hostility to the nation, a majority of the Senate committee held this a reason for vacating his seat as a Senator.

On June 2, 1906,¹ in the Senate, Mr. Julius C. Burrows, of Michigan, said:

Mr. President, I am directed by the Committee on Privileges and Elections to report the action of the committee upon the resolution referred to that committee to inquire into the right and title of Reed Smoot to hold a seat in the Senate of the United States as a Senator from the State of Utah, and to say that the committee reached a conclusion at its last meeting and authorized the chairman to report to the Senate that the senior Senator from Utah is not entitled to a seat in the Senate of the United States. The committee directed the chairman to make a formal report, which will be done some time during the coming week.

An expression of opinion was had by the committee upon what steps would be necessary to take if the report of the committee was adopted by the Senate that the Senator from Utah is not entitled to a seat, and upon that there was a difference of opinion. The committee were divided as to whether it would have to be followed by a resolution to expel the Senator from Utah or whether a declaration that he is not entitled to a seat would be sufficient. That will be a matter, however, for the Senate to determine.²

On June 11³ the formal report was made in the Senate by Mr. Burrows.

A preliminary question as to the authority of the Senate was discussed at length:

Before proceeding to an examination of the protest and answer and the testimony taken by the committee, it may be well to examine, briefly, the authority of the Senate in the premises and the nature and scope of the investigation.

The Constitution provides (art. 1, sec. 5, par. 1) that "Each House shall be the judge of the elections, returns, and qualifications of its own members." It is now well established by the decisions of the Senate in a number of cases that, in order to be a fit representative of a sovereign State of the Union in the Senate of the United States, one must be in all respects obedient to the Constitution and laws of the United States and of the State from which he comes, and must also be desirous of the welfare of his country and in hearty accord and sympathy with its Government and institutions. If he does not possess these qualifications, if his conduct has been such as to be prejudicial to the welfare of society, of the nation, or its Government, he is regarded as being unfit to perform the important and confidential duties of a Senator, and may be deprived of a seat in the Senate, although he may have done no act of which a court of justice could take cognizance.

The report then proceeds to discuss the Senate cases of William Blount, John Smith, Jesse D. Bright, Philip F. Thomas, and also the following English cases:

In the British Parliament the same principle has been recognized in a number of cases and is now fully established.

In the year 1812 Benjamin Walsh was expelled from the House of Commons as "unworthy and unfit to continue a member of this House," on account of said Walsh having been guilty of "gross fraud and

¹ First session Fifty-ninth Congress.

² Seven members of the committee concurred that Mr. Smoot was not entitled to his seat—Messrs. Julius C. Burrows, of Michigan; Jonathan P. Dolliver, of Iowa; Edward W. Pettus, of Alabama; Fred T. Dubois, of Idaho; Lee S. Overman, of North Carolina; James B. Frazier, of Tennessee, and Joseph W. Bailey, of Texas. A minority of five dissented—Messrs. J. B. Foraker, of Ohio; Albert J. Beveridge, of Indiana; William P. Dillingham, of Vermont; Albert J. Hopkins, of Illinois, and Philander C. Knox, of Pennsylvania. While Mr. Bailey concurred in the majority report he did not agree that Mr. Smoot could be excluded, but favored expulsion. Mr. Chauncey M. Depew, of New York, the thirteenth member of the committee, took no part in the decision.

³ Senate Report No. 4253.

notorious breach of trust," although his offense was one "not amounting to felony." (67 Commons Journal, 175-176.) In that case the chancellor of the exchequer said:

"He could not think that because an act of Parliament did not make a moral crime a legal one the House of Commons should be prevented from taking cognizance of it." (Hansard's Parliamentary Debates, first series, vol. 21, p. 1199.)

In the year 1814 Sir Thomas Cochrane was expelled from the House of Commons for being concerned in a conspiracy to spread the false report that the French army had been defeated, Napoleon killed, and that the allied sovereigns were in Paris, the object to be attained by such false report being "to occasion a temporary rise and increase in the prices of the public Government funds," to the injury of those who should purchase such funds "during such last-mentioned temporary rise and increase in the prices thereof." (69 Commons Journal, 427-433.)

The report then summarizes as follows the protest against the seating of Mr. Smoot, which protest was signed by "eighteen reputable citizens" of Utah.

The protest before referred to against the seating of Mr. Smoot as a Senator from the State of Utah is stated in such protest to be "upon the ground and for the reason that he is one of a self-perpetuating body of fifteen men who, constituting the ruling authorities of the Church of Jesus Christ of Latter-Day Saints, or 'Mormon Church,' claim, and by their followers are accorded the right to claim, supreme authority, divinely sanctioned, to shape the belief and control the conduct of those under them in all matters whatsoever, civil and religious, temporal and spiritual, and who, thus uniting in themselves authority in church and state, do so exercise the same as to inculcate and encourage a belief in polygamy and polygamous cohabitation; who countenance and connive at violations of the State law prohibiting the same, regardless of pledges made for the purpose of obtaining statehood and of covenants made with the people of the United States, and who by all the means in their power protect and honor those who, with themselves, violate the laws of the land and are guilty of practices destructive of the family and of the home."

In support of this protest the protestants make certain charges and assertions, the substance of which is as follows:

1. The Mormon priesthood, according to the doctrines of that church, is vested with supreme authority in all things spiritual and temporal.

2. The first presidency and twelve apostles (said Reed Smoot being one of said twelve apostles) are supreme in the exercise of the authority of the Mormon Church in all things temporal and spiritual. In support of this second proposition instances are given of the interference of the first presidency and twelve apostles in the political affairs of the State of Utah, and quotations at length are given from the declarations of officials in the Mormon Church regarding the authority of the leaders in said church to dictate to the membership thereof concerning the political action of said members.

3 and 4. That the first presidency and twelve apostles of the Mormon Church have not abandoned the principles and practice of political dictation; neither have they abandoned their belief in polygamy and polygamous cohabitation.

5. That the first presidency and twelve apostles (of whom Reed Smoot is one) also practice or connive at and encourage the practice of polygamy, and have, without protest or objection, permitted those who held legislative offices by their will and consent to attempt to nullify enactments against polygamous cohabitation.

6. That the supreme authorities of the Mormon Church, namely, the first presidency and twelve apostles (of whom Mr. Smoot is one), not only connive at violations of the law against polygamy and polygamous cohabitation, but protect and honor the violators of such laws.

The protest further asserts that the leaders of the Mormon Church (of whom Mr. Smoot is one) are solemnly banded together against the people of the United States in the endeavor of said leaders to baffle the designs and frustrate the attempts of the Government to eradicate polygamy and polygamous cohabitation.

The protest further charges that the conduct and practices of the first presidency and twelve apostles (of whom Mr. Smoot is one) are well known to be, first, contrary to the public sentiment of the civilized world; second, contrary to express pledges which were given by the leaders of the Mormon Church in procuring amnesty; third, contrary to the express conditions upon which the escheated property of the Mormon Church was returned; fourth, contrary to the pledges given by the representa-

tives of that church in their plea for statehood; fifth, contrary to the pledges required in the enabling act and given in the State constitution of Utah; sixth, contrary to a provision in the constitution of Utah providing that "there shall be no union of church and state, nor shall any church dominate the State or interfere with its functions;" and seventh, contrary to law. The protest concludes by asking that the Senate make inquiry touching the matters stated in said protest.

This protest is followed by certain charges made by one John L. Leilich under oath, which are in the main of the same tenor and effect as the charges made in the protest, with the additional charge that Mr. Smoot is a polygamist, having a legal wife and a plural wife, and the further charge that Mr. Smoot has, as an apostle of the Mormon Church, taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."

Mr. Smoot made answer, of which the report says:

To the statements made in the protest and the charges by Mr. Leilich Mr. Smoot made answer, which answer is in the nature of a demurrer to all the charges contained in the protest and to the charges made by Mr. Leilich, except two, namely, that Mr. Smoot is a polygamist and that he is bound by some oath or obligation which is inconsistent with the oath taken by him as a Senator. Both these charges he denies, and further denies, specifically and categorically, the charges made in the protest and by Mr. Leilich.

(1) The majority of the committee in their report first proceed to discuss the nature of the Mormon hierarchy and the encouragement of polygamy and polygamous cohabitation by the Mormon authorities, saying:

The first reason assigned by the protestants why Mr. Smoot is not entitled to a seat in the Senate is, in effect, that he belongs to a self-perpetuating body of fifteen men who constitute the ruling authorities of the Church of Latter-Day Saints, or "Mormon Church," so called; that this ruling body of the church both claims and exercises the right of shaping the belief and controlling the conduct of the members of that church in all matters whatsoever, civil and religious, temporal and spiritual. It is then alleged that this self-perpetuating body of fifteen men, of whom Mr. Smoot is one, uniting in themselves authority in both church and state, so exercise this authority as to encourage a belief in polygamy as a divine institution and by both precept and example encourage among their followers the practice of polygamy and polygamous cohabitation.

That the first presidency and twelve apostles of the Mormon Church are a self-perpetuating body of fifteen men seems to be well established by the testimony of the one most competent to speak upon that subject, the president of the Church of Latter-Day Saints, Mr. Joseph F. Smith, who testifies, as will be seen on pages 91 and 92 of volume 1 of the printed copy of the proceedings in the investigation, that vacancies occurring in the number of the twelve apostles are filled by the apostles themselves, with the consent and approval of the first presidency. * * *

It further appears that any one of the twelve apostles may be removed by his fellow-apostles without consulting the members of the church in general. It is also in proof that the first presidency and twelve apostles govern the church by means of so-called "revelations from God," which revelations are given to the membership of the church as emanating from divine authority. It is also shown that those members of the Mormon Church who refuse to obey the revelations so communicated by the priesthood thereby become out of harmony with the church and are thus practically excluded from the blessings, benefits, and privileges of membership in the church.

It is also well established by the testimony that the members of the Mormon Church are governed in all things by the first presidency and twelve apostles; that this authority is extended to the membership through a series and succession of subordinate officials, consisting of presidents of seventies, presiding bishops, elders, presidents of stakes, bishops, and other officials; that one of the chief requirements by the leaders of the church is that members shall take counsel of their religious superiors in all things whatsoever, whether civil or religious, temporal or spiritual; that the failure to receive and obey counsel in any of these matters subjects the one who refuses to the discipline of the church; that this discipline is administered in the first instance by the subordinate officials, subject to the right to appeal to the higher officials of the church, and ultimately to the first president and twelve apostles. These rules, enforced, as they are, by the discipline of the Mormon Church, constitute the first president and twelve apostles a hierarchy, a body of men at the head of a religious organization

governing their followers with absolute and unquestioned authority in all things relating to temporal and political as well as to spiritual affairs.

The testimony taken before the committee also shows beyond a reasonable doubt that this authority of the first presidency and twelve apostles is so exercised over the members of the Mormon Church as to inculcate a belief in the divine origin of polygamy and its rightfulness as a practice, and also to encourage the membership of that church in the practice of polygamy and polygamous cohabitation. While this is denied on the part of the officials of the church, the truthfulness of the claim of the protestants in this regard is shown by a great number of facts and circumstances, no one of which is perhaps conclusive in itself, but when taken together form a volume of testimony so cogent and convincing as to leave no reasonable doubt in the mind that the truth is as stated by the protestants. It is proved without denial that the Book of Doctrine and Covenants, one of the leading authorities of the Mormon Church, and still circulated by that church as a book equal in authority to the Bible and the Book of Mormon, contains the revelation regarding polygamy, of which the following is a part:

"61. And again, as pertaining to the law of the priesthood: If any man espouse a virgin and designs to espouse another and the first give her consent, and if he espouse the second, and they are virgins and have vowed to no other man, then he is justified—he can not commit adultery, for they are given unto him; for he can not commit adultery with that that belongeth to him and to no one else.

"62. And if he have ten virgins given unto him by this law he can not commit adultery, for they belong to him and they are given unto him; therefore is he justified.

"63. But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery and shall be destroyed, for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfill the promise which was given by my Father before the foundation of the world; and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.

"64. And again, verily, verily, I say unto you, if any man hath a wife who holds the keys of this power and he teaches unto her the law of my priesthood as pertaining these things, then shall she believe and administer unto him or she shall be destroyed, said the Lord your God, for I will destroy her; for I will magnify my name upon all those who receive and abide in my law.

"65. Therefore, it shall be lawful in me, if she receives not this law for him to receive all things whatsoever I, the Lord his God, will give unto him, because she did not minister unto him according to my word; and she then becomes the transgressor, and he is exempt from the law of Sarah, who ministered unto Abraham according to the law when I commanded Abraham to take Hager to wife."

It is also shown that numerous other publications of the Mormon Church are still circulated among the members of that church with the knowledge and by the authority of the church officials, which contain arguments in favor of polygamy. The Book of Doctrine and Covenants is not only still put forth to the members of the church as authoritative in all respects, but the first presidency and twelve apostles have never incorporated therein the manifesto forbidding the practice of polygamy and polygamous cohabitation, nor have they at any time or in any way qualified the reputed revelation to Joseph Smith regarding polygamy. And this Book of Doctrine and Covenants, containing the polygamic revelation, is regarded by Mormons as being of higher authority than the manifesto suspending polygamy.

Bearing in mind the authority of the first presidency and twelve apostles over the whole body of the Mormon Church, it is very evident that if polygamy were discountenanced by the leaders of that church it would very soon be a thing of the past among the members of that church. On the contrary, it appears that since the admission of Utah into the Union as a State the authorities of the Mormon Church have countenanced and encouraged the commission of the crime of polygamy instead of preventing it, as they could easily have done.

A sufficient number of specific instances of the taking of plural wives since the "manifesto of 1890," so called, have been shown by the testimony as having taken place among officials of the Mormon Church to demonstrate the fact that the leaders in this church, the first presidency and the twelve apostles, connive at the practice of taking plural wives, and have done so ever since the manifesto was issued which purported to put an end to the practice.

The report then goes on to cite specific instances as shown in the testimony.

The committee also charged that the Mormon Church had suppressed other testimony, and had denied the committee access to records.

The report continues:

Aside from this it was shown by the testimony, and in such a way that the fact could not possibly be controverted, that a majority of those who give the law to the Mormon Church are now, and have been for years, living in open, notorious, and shameless polygamous cohabitation. The list of those who are thus guilty of violating the laws of the State and the rules of public decency is headed by Joseph F. Smith, the first president, "prophet, seer, and revelator" of the Mormon Church.

The committee cites names in support of this and continues:

These facts abundantly justify the assertion made in the protest that "the supreme authorities in the church, of whom Senator-elect Reed Smoot is one, to wit, the first presidency and twelve apostles, not only connive at violation of, but protect and honor the violators of the laws against polygamy and polygamous cohabitation."

It will be seen by the foregoing that not only do the first presidency and twelve apostles encourage polygamy by precept and teaching, but that a majority of the members of that body of rulers of the Mormon people give the practice of polygamy still further and greater encouragement by living the lives of polygamists, and this openly and in the sight of all their followers in the Mormon Church. It can not be doubted that this method of encouraging polygamy is much more efficacious than the teaching of that crime by means of the writings and publications of the leaders of the church, and this upon the familiar principle that "actions speak louder than words."

And not only do the president and a majority of the twelve apostles of the Mormon Church practice polygamy, but in the case of each and every one guilty of this crime who testified before the committee the determination was expressed openly and defiantly to continue the commission of this crime without regard to the mandates of the law or the prohibition contained in the manifesto. And it is in evidence that the said first president, addressing a large concourse of the members of the Mormon Church at the tabernacle in Salt Lake City in the month of June, 1904, declared that if he were to discontinue the polygamous relation with his plural wives he should be forever dammed, and forever deprived of the companionship of God and those most dear to him throughout eternity. Thus it appears that the "prophet, seer, and revelator" of the Mormon Church pronounces a decree of eternal condemnation throughout all eternity upon all members of the Mormon Church who, having taken plural wives, fail to continue the polygamous relation. So that the testimony upon that subject, taken as a whole, can leave no doubt upon any reasonable mind that the allegations in the protest are true, and that those who are in authority in the Mormon Church, of whom Mr. Smoot is one, are encouraging the practice of polygamy among the members of that church, and that polygamy is being practiced to such an extent as to call for the severest condemnation in all legitimate ways.

THE MANIFESTO A DECEPTION.

Against these facts the authorities of the Mormon Church urge that in the year 1890 what is generally termed "a manifesto" was issued by the first presidency of that church, suspending the practice of polygamy among the members of that church. It may be said in the first place that this manifesto misstates the facts in regard to the solemnization of plural marriages within a short period preceding the issuing of the manifesto. It now appears that in a number of instances plural marriages had been solemnized in the Mormon Church, and, in the case of those high in authority in that church, within a very few months preceding the issuing of the manifesto.

It is also observable that this manifesto in no way declares the principle of polygamy to be wrong or abrogates it as a doctrine of the Mormon Church, but simply suspends the practice of polygamy to be resumed at some more convenient season, either with or without another revelation. It is now claimed by the first president and other prominent officials of the Mormon Church that the manifesto was not a revelation, but was, at the most, an inspired document, designed "to meet the hard conditions then confronting" those who were practicing polygamy and polygamous cohabitation, leaving what the Mormon leaders are pleased to term "the principle of plural marriage" as much a tenet of their faith and rule of practice when possible, as it was before the manifesto was issued. * * *

And one of the twelve apostles has declared the fact to be that "the manifesto is only a trick to beat the devil at his own game." Further than this, it is conceded by all that this manifesto was intended to prohibit polygamous cohabitation as strongly as it prohibited the solemnization of plural

marriages. In the case of polygamous cohabitation, the manifesto has been wholly disregarded by the members of the Mormon Church. It is hardly reasonable to expect that the members of that church would have any greater regard for the prohibition of plural marriage.

The contention that the practice of polygamy is rightful as a religious ceremony and therefore protected by that provision of the Constitution of the United States which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," ought to be forever set at rest by the repeated decisions of the Supreme Court of the United States. In the case of the Mormon Church *v.* The United States, Justice Bradley, in delivering the opinion of the court, said:

"One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thuggee of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one on that account would hesitate to brand these practices now as crimes against society and obnoxious to condemnation and punishment by the civil authority."

In the case of Davis *v.* Beason Justice Field, in delivering the opinion of the court, said:

"Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind."

ONE LIVING IN POLYGAMOUS COHABITATION IS IN LAW A POLYGAMIST.

The members of the first presidency and twelve apostles of the Mormon Church claim that there is a distinction between what they term polygamy—that is, the contracting of plural marriages—and polygamous cohabitation with plural wives. But under the circumstances his distinction is little short of ridiculous. As is demonstrated by the testimony, the so-called manifesto was aimed at polygamous cohabitation as well as against the taking of plural wives, and it is the veriest sophistry to contend that open, notorious cohabitation with plural wives is less offensive to public morals than the taking of additional wives. Indeed, it is the testimony of some of those who reside in communities that are cursed by the evils of polygamy that polygamous cohabitation is fully as offensive to the sense of decency of the inhabitants of those communities as would be the taking of plural wives.

And this excuse of the Mormon leaders is as baseless in law as it is in morals. In the case of Murphy *v.* Ramsay, decided by the Supreme Court of the United States and reported in the United States Supreme Court Reports, volume 114, page 15, it was decided that any man is a polygamist who maintains the relation of husband to a plurality of wives, even though in fact he may cohabit with only one. The court further held in the same case that a man occupying this relation to two or more women can only cease to be a polygamist when he has finally and fully dissolved the relation of husband to several wives. In other words, there is and can be no practical difference in law or in morals between the offense of taking plural wives and the offense of polygamous cohabitation. The same doctrine is affirmed in the case of Cannon *v.* United States (116 U. S. Supreme Court Reports, p. 55).

The minority views admit the existence of polygamous cohabitation, but say, after quoting testimony in support of their view:

In other words, the conditions existing in Utah since Reed Smoot became an official of the Mormon Church in 1900 have been such that non-Mormons and Mormons alike have acquiesced in polygamous cohabitation on the part of those who married before the manifesto of 1890, as an evil that could best be gotten rid of by simply tolerating it until in the natural course of events it shall have passed out of existence.

(2) The majority report then proceeds to urge that Mr. Smoot is responsible for the conduct of the organization to which he belongs:

It is urged in behalf of Mr. Smoot that, conceding it to be true that the first president and some of the apostles are living in polygamy and that some of the leaders of the Mormon Church encourage polygamous practices, Mr. Smoot himself is not a polygamist, does not practice polygamy, and that there is no evidence that he has personally and individually encouraged the practice of polygamy by members of the Mormon Church, and that he ought not to be condemned because of the acts of his associates. This position is wholly untenable. Mr. Smoot is an inseparable part of the governing body of the Mormon Church—the first presidency and twelve apostles—and those who compose that organization form a unit, an entirety, and whatever is done by that organization is the act of each and every member thereof, and whatever policy is adopted and pursued by the body which controls the Mormon Church Mr. Smoot must be held to be responsible for as a member of that body. That one may be legally, as well as morally, responsible for unlawful acts which he does not himself commit is a rule of law too elementary to require discussion. “What one does by another he does by himself” is a maxim as old as the common law. And as the first presidency and twelve apostles of the Mormon Church have authority over the spiritual affairs of the members of that church, it follows that such governing body of said church has supreme authority over the members of that church in respect to the practice of polygamy and polygamous cohabitation.

In England in former years and under the canon law, matters of marriage, divorce, and legitimacy were under the jurisdiction of the ecclesiastical courts of the Kingdom, in which the punishment was in the nature of a spiritual penalty for the good of the soul of the offender, this penalty in many cases being that of excommunication or expulsion from the church. (1 Blackstone’s Commentaries, 431; 3 Blackstone’s Commentaries, 92; 4 Blackstone’s Commentaries, 153 and note; *Reynolds v. United States*, 98 U.S., 145, 164–165.) And in later years, while the civil law now prohibits and punishes bigamy, the authorities of every Christian church in this country take cognizance of matrimonial affairs and by the authority of the church in spiritual matters prevent and punish by censure or expulsion any infraction of the rules of the church regarding marriage.

The testimony taken upon this investigation shows beyond controversy that the authority of the first presidency and the twelve apostles of the Mormon Church over the members of said church is such that were the said first presidency and twelve apostles to prohibit the practice of polygamy and polygamous cohabitation by its members and abandon the practice themselves and expel from the church all who should persist in the practice those offenses would instantly cease in that church. And the fact that not a single member of the Mormon Church has ever fallen into disfavor on account of polygamous practices is conclusive proof that the ruling authorities of that church countenance and encourage polygamy.

The conduct of Mr. Smoot in this regard can not be separated from that of his associates in the government of the Mormon Church. Whatever his private opinions or his private conduct may be, he stands before the world as an integral part of the organization which encourages, counsels, and approves polygamy, which not only fails to discipline those who break the laws of the country, but, on the contrary, loads with honors and favors those who are among the most noted polygamists within the pale of that church.

It is an elementary principle of law that where two or more persons are associated together in an act, an organization, an enterprise, or a course of conduct which is in its character or purpose unlawful the act of any one of those who are thus associated is the act of all, and the act of any number of the associates is the act of each one of the others.

An eminent legal authority says:

“Every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties before or afterwards in furtherance of the common design. The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said by anyone in furtherance of that design a part of the *res gestae* and therefore the act of all. (2 Greenleaf on Evidence, secs. 93, 94. See also *Commonwealth v. Warren*, 6 Mass., 74; *People v. Mather*, 4 Wend.,

229, 260; *People v. Peckens*, 153 N. Y., 576, 586, 593; *United States v. Gooding*, 12 Wheaton, 459, 469; *American Fur Company v. United States*, 2 Peters, 358, 365; *Nudd et al v. Burrows*, 91 U. S., 426, 438 *United States v. Mitchell*, 1 Hughes, 439 (Federal Cases, No. 15790); *Stewart v. Johnson*, 3 Har. (N. J.), 87; *Hinchman v. Ritchie*, *Brightley's N. P.* (Pa.), 143; *Freeman v. Stine*, 34 Leg. Int. (Pa.), 95; *Spies et al. v. People*, 122 Illinois, 1.)"

The case last cited illustrates this principle more forcibly than any of the others referred to. In that case, which is commonly known as "the anarchists' case," there was, as to some of the defendants, very little evidence, and as to others of the defendants no satisfactory evidence that they were present at the commission of the murder with which they were charged, or advised or intended the murder which was committed by an unknown person. But it was proved that the defendants were members of an organization known as the International Association of Chicago, having for its object the destruction of the law and government and incidentally of the police and militia as the representatives of law and government, and that some of the defendants had, by spoken and printed appeals to workingmen and others, urged the use of force, deadly weapons, and dynamite in resistance to the law and its officers.

In denying the motion for a new trial in the anarchists' case the judge who presided at the trial used the following language:

"Now on the question of the instructions, whether these defendants, or any of them, anticipated or expected the throwing of the bomb on the night of the 4th of May is not a question which I need to consider, because the conviction can not be sustained, if that is necessary to a conviction, however much evidence of it there may be, because the instructions do not go upon that ground. The jury were not instructed to find the defendants guilty if they believed they participated in the throwing of that bomb, or advised or encouraged the throwing of that bomb, or anything of that sort. Conviction has not gone upon the ground that they did have any personal participation in the particular act which caused the death of Degan, but the conviction proceeds upon the ground, under the instructions, that they had generally by speech and print advised large classes of the people, not particular individuals, but large classes, to commit murder, and have left the commission, time, and place to the individual will and whim, or caprice, or whatever it may be, of each individual man who listened to their advice and, influenced by that advice, somebody not known did throw the bomb which caused Degan's death." (Century Magazine, April, 1893, p. 835.)

It will be seen by the decision of the court upon the motion for a new trial in the case of *Spies et al. v. People* that the anarchists were not convicted upon the ground that they had participated in the murder of which they were convicted. Whether they were or were not participants in the commission of this crime was not the main question at issue. They were convicted because they belonged to an organization which, as an organization, advised the commission of acts which would lead to murder.

Of like import is the decision in the case of *Davis v. Beason*, decided by the Supreme Court of the United States in 1889, the decision being reported in volume 133, *United States Supreme Court Reports*, page 333. At the time of this decision the Revised Statutes of the State of Idaho provided that no person "who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election or to hold any position or office of honor, trust, or profit within this Territory."

This provision of law the Supreme Court of the United States held to be constitutional and legal. It will be observed that this act disfranchises certain persons and makes them ineligible to any position or office of honor, trust, or profit, not for committing the crime of polygamy, nor for teaching, advising, counseling, or encouraging others to commit the crime, but because of their membership in an organization which teaches, advises, counsels, and encourages others to commit the crime of polygamy. In *Wooley v. Watkins* (2 Idaho Rep., 555, 566), the court say:

"Orders, organizations, and associations, by whatever name they may be called, which teach, advise, counsel, or encourage the practice or commission of acts forbidden by law, are criminal organizations. To become and continue to be members of such organizations or associations are such overt acts of recognition and participation as make them paxticeps criminis and as guilty, in contemplation of criminal law, as though they actually engaged in furthering their unlawful objects and purposes." (See also *Innis v Bolton*, 2 Idaho Rep., 407, 414.)

It being a fact that the first presidency and the twelve apostles of the Mormon Church teach, advise, counsel, and encourage the members of that church to practice polygamy and polygamous cohabitation, which are contrary to both law and morals, and Mr. Smoot, being a member of that organization, he must fall under the same condemnation.

And the rule in civil cases is the same as that which obtains in the administration of criminal law. One who is a member of an association of any nature is bound by the action of his associates, whether he favors or disapproves of such action. He can at any time protect himself from the consequences of any future action of his associates by withdrawing from the association, but while he remains a member of the association he is responsible for whatever his associates may do.

But the complicity of Mr. Smoot in the conduct of the leaders of the Mormon Church in encouraging polygamy and polygamous cohabitation does not consist wholly in the fact that he is one of the governing body of that church. By repeated acts, and in a number of instances, Mr. Smoot has, as a member of the quorum of the twelve apostles, given active aid and support to the members of the first presidency and twelve apostles in their defiance of the laws of the State of Utah and of the laws of common decency, and their encouragement of polygamous practices by both precept and example.

It is shown by the testimony of Mr. Smoot himself that he assisted in the elevation of Joseph F. Smith to the presidency of the Mormon Church. That he has since repeatedly voted to sustain said Joseph F. Smith, and that he so voted after full knowledge that said Joseph F. Smith was living in polygamous cohabitation and had asserted his intention to continue in this course in defiance of the laws of God and man. He also assisted in the selection of Heber J. Grant as president of a mission when it was a matter of common notoriety that said Heber J. Grant was a polygamist. He voted for the election of Charles W. Penrose as an apostle of the Mormon Church after testimony had been given in this investigation showing him to be a polygamist. It is difficult to perceive how Mr. Smoot could have given greater encouragement to polygamy and polygamous cohabitation than by thus assisting in conferring one of the highest honors and offices in the Mormon Church on one who had been and was then guilty of these crimes. As trustee of an educational institution he made no protest against the continuance in office of Benjamin Cluff, jr., a noted polygamist, as president of that institution, nor made any effort to discover the truth that said Cluff had taken another plural wife long after the manifesto. Nor did he make any protest, as such trustee, against the election of George H. Brimhall, another polygamist, in the place of Benjamin Cluff, jr.

Since his election as an apostle of the Mormon Church Mr. Smoot has been intimately associated with the first president and with those who—with himself—constitute the counsel of the twelve apostles. The fact that many of these officials were living in polygamous relations with a number of wives was a matter of such common knowledge in the community that it is incredible that Mr. Smoot should not have had sufficient notice of this condition of affairs to at least have put him on inquiry. If he did not know of these facts it was because he took pains not to be informed of them. At no time has he uttered a syllable of protest against the conduct of his associates in the leadership of the Mormon Church, but, on the contrary, has sustained them in their encouragement of polygamy and polygamous cohabitation both by his acts (as hereinbefore set forth) and by his silence. In the judgment of the committee, Mr. Smoot is no more entitled to a seat in the Senate than he would be if he were associating in polygamous cohabitation with a plurality of wives.

The minority of the committee take issue with this conclusion:

The testimony on this point is also carefully collated and analyzed in the annexed statement.

It will be found by an examination of that testimony that he has never at any time, and particularly he has not since the manifesto of 1890, countenanced or encouraged plural marriages; but that, on the contrary, he has uniformly upheld the policy of the church, as announced by that proclamation, by actively advocating and exerting his influence to effect a complete discontinuance of such marriages, and that in the few instances established by the testimony where plural marriages and polygamous cohabitation, as a result of them, have occurred since 1890 they have been without any encouragement, countenance, or approval whatever on his part.

As to polygamous cohabitation in consequence of plural marriages entered into before the manifesto of 1890, there is no testimony to show that he has ever done more than silently acquiesce in this offense against law. In view of his important and influential position in the church, this acquiescence might be

regarded as inexcusable if it were not for the peculiar circumstances attending the commission of this offense.

To understand these circumstances it is necessary to recall some historical facts, among which are some that indicate that the United States Government is not free from responsibility for these violations of the law. Instead of discountenancing and prohibiting polygamy when it was first proclaimed and practiced, the Congress remained silent and did nothing in that behalf. While Congress was thus at least manifesting indifference, President Fillmore and the Senate of the United States, in September, 1850, gave both recognition and encouragement by the appointment and confirmation of Brigham Young, the then head of the church and an open and avowed advocate and representative of polygamy, to be governor of the Territory of Utah. When his term of office expired under this appointment he was reappointed by President Pierce and again confirmed by the Senate.

There was no legislation or action of any kind by Congress on this subject until the act of July 1, 1862, which was in language as well as legal effect nothing more than a prohibition of bigamy in the Territories and other places over which the United States had jurisdiction.

After this act for a period of twenty years plural marriages and polygamous cohabitation continued in the Territory of Utah practically unrestrained and without any serious effort of the part of the United States to restrict the same.

Finally, in response to an aroused public sentiment, Congress passed the act of March 22, 1882, by which it prohibited both plural marriages and polygamous cohabitation, but legitimized the children of all such marriages born prior to the 1st day of January, 1883. Under this act prosecutions were inaugurated to enforce its provisions, but it was soon demonstrated that public sentiment was such that only partial and very unsatisfactory success could be secured.

Then followed what is known as the "Edmunds-Tucker Act" of March 3, 1887, by which, among other things, the rules of evidence were so changed as to make it less difficult to secure evidence in prosecutions for polygamy and polygamous cohabitation. Again, by the terms of this act all the children born within twelve months after its passage were legitimized.

This statute was upheld by the Supreme Court of the United States, and efforts to prosecute such offenses were redoubled, with such success that on the 26th day of September, 1890, the then president of the church, Wilford Woodruff, issued what is known as the "manifesto of 1890," forbidding further plural marriages. So far as the testimony discloses there have been but few plural marriages since, perhaps not more than the bigamous marriages during the same period among the same number of non-Mormons.

The evidence shows that there were at this time about 2,400 polygamous families in the Territory of Utah. This number was reduced to five hundred and some odd families in 1905. A few of these families may have removed out of the State of Utah, but so far as the testimony discloses the great reduction in number has been on account of the deaths of the heads of these families. It will be only a few years at most until all will have passed away. This feature of the situation has had a controlling influence upon public sentiment in the State of Utah with respect to the prosecutions for polygamous cohabitation since the manifesto of 1890.

Whether right or wrong, when plural marriages were stopped and the offense of polygamy was confined to the cohabitation of those who had contracted marriages before 1890, and particularly those who had contracted marriages before the statutes of 1887 and 1882, the disinclination to prosecute for these offenses became so strong, even among the non-Mormons, that such prosecutions were finally practically abandoned.

It was not alone the fact that if no further plural marriages were to be contracted, polygamy would necessarily in the course of time die out and pass away, but also the fact that Congress having, by the statutes of 1882 and 1887, specifically legitimized the children of these polygamous marriages, it was inconsistent, if not unwise and impossible, in the opinion of even the non-Mormons, to prohibit the father of such children from living with, supporting, educating, and caring for them; but if the father was thus to live with, support, educate, and care for the children, it seemed harsh and unreasonable to exclude from this relationship the mothers of the children.

Such are some of the reasons assigned for the lack of a public sentiment to uphold successful prosecutions for polygamous cohabitation after 1890. It is unnecessary to recite others, for it is enough to say that whatever the real reason or explanation may be, the fact was that after 1890 it became practically impossible to enforce the law against these offenses, except in flagrant cases.

Such was the situation when the Territory applied for admission to the Union and Congress passed the enabling act of July 16, 1894, by which the people of Utah, in order to entitle them to admission into the Union, on terms prescribed by Congress, were required to incorporate in their constitution a proviso that "polygamous or plural marriages are forever prohibited;" not, polygamous cohabitation, it will be observed, but only polygamous marriages. The testimony shows that there was a common understanding both in Congress and Utah that there were not only to be no more plural marriages, but that prosecutions for polygamous cohabitation had become so difficult that there was a practical suspension of them, and that time was the only certain solution of the perplexing problem.

This sentiment has not only ever since continued, but with the constant diminution of the number of polygamous families and the rapid approach of the time when all will have passed away there has come a natural strengthening of the sentiment. The testimony in this respect is set forth at length in the annexed statement, but we make the following quotations in order that it may appear in this summary that there is this common disposition among non-Mormons as well as Mormons.

Judge William McCarthy, of the supreme court of Utah, a non-Mormon and an uncompromising opponent of polygamy, who has held many important offices of trust, among others that of assistant United States attorney for Utah, and who, as such, was charged with the duty of prosecuting these offenses, testified as follows:

"I prosecuted them (offenses of polygamous cohabitation) before the United States commissioners up until 1893, when the United States attorney refused to allow my accounts for services for that kind of work, and then I quit and confined my investigations before the grand jury in those cases."

In explanation of his action he testified—we quote from the annexed statement:

"That he found the press was against the prosecutions; that the public prosecutor, whose attention he invited to the matter, refused to proceed. From this and other facts which came to his knowledge, Judge McCarthy reached the conclusion that the public sentiment was against interfering with men in their polygamous relations who had married before the manifesto."

The minority quote other testimony, including that of Mr. Dubois, one of those concurring in the majority report, as justification for their opposition to the conclusions of the majority on this point.

(3) The majority report next discusses at length the participation in and domination of the Mormon Church in secular affairs, especially in political matters:

A careful examination and consideration of the testimony taken before the committee in this investigation leads to the conclusion that the allegations in the protest concerning the domination of the leaders of the Mormon Church in secular affairs are true, and that the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints exercise a controlling influence over the action of the members of that church in secular affairs as well as in spiritual matters; and that, contrary to the principles of the common law under which we live and the constitution of the State of Utah, the said first presidency and twelve apostles of the Mormon Church dominate the affairs of the State and constantly interfere in the performance of its functions. The domination by the leaders of the church under their claim to exercise divine authority in all matters is manifested in a general way in innumerable instances.

The right to do so is openly claimed by those who profess to speak in behalf of the church. As late as February 26, 1904, one of the twelve apostles, in a public address, said "that from the view point of the gospel there could be no separation of temporal and spiritual things, and those who object to church people advising and taking part in temporal things have no true conception of the gospel of Christ and the mission of the church."

The method by which the first presidency and twelve apostles of the Mormon Church direct all the temporal affairs of the members of that church under the claim that such direction is by divine authority is by requiring the members of the church in all their affairs, both spiritual and temporal, and especially the latter, to "take counsel." This means that they are to be advised by their immediate superiors. These superiors in turn take their instructions from those above them, and so on back to the point whence most, if not all, these directions emanate—that is, the first presidency and twelve apostles.

The report cites at length instances of this participation in secular affairs, and then says of political domination:

But it is in political affairs that the domination of the first presidency and twelve apostles of the Mormon Church is most efficacious and most injurious to the interests of the State. The constitution of the State of Utah provides "There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions." (Vol. 1, p. 25.) Notwithstanding this plain provision of the constitution of Utah, the proof offered on the investigation demonstrates beyond the possibility of doubt that the hierarchy at the head of the Mormon Church has for years past formed a perfect union between the Mormon Church and the State of Utah, and that the church through its head dominates the affairs of the State in things both great and small. Even before statehood was an accomplished fact, and while the State was in process of formation, and afterwards, during the sessions of the first and succeeding legislatures, it was notorious that a committee appointed by the leaders of the Mormon Church was supervising the legislation of the State.

At about the same time, or shortly prior thereto, it became known throughout Utah that the leading officials of the Mormon Church desired that the voters belonging to that church should so divide on political lines that about one-half should belong to one of the great political parties of the nation and the other half to the other party, leaving a considerable number unassigned to either party, so that their votes could be cast for one party or the other, as might be necessary to further the interests of that church.

It is, of course, intended by the leaders of the church that this influence shall be secretly exerted, and this is in many cases, if not in most cases, easily accomplished by means of the perfect machinery of the church, which has been adverted to, by which the will of the first presidency and twelve apostles is transmitted through ecclesiastical channels, talked over in prayer circles of the high councils of the church, and then promulgated to the members of the church as "the will of the Lord." Notwithstanding this attempt at secrecy, it has for many years been a matter of common knowledge among the people of those States in which the Mormon Church is strongest that political influence is being continually exerted in the matter of State and lower municipal officials. As was said by one of the witnesses who testified on the investigation, "Whenever they indorse a man, he will be elected. Whenever they put upon him the seal of their disapprobation, he will not be."

The report also at this point cites instances at length, and then continues:

Not only is Mr. Smoot one of those by and through whom the political affairs of Utah are dominated, but his election to the Senate was, it is believed, the result of such domination.

When Mr. Smoot concluded to become a candidate for the Senate he was careful to obtain the "consent" of the first presidency and twelve apostles to his candidacy. But this so-called "consent" of the rulers of the church was naturally regarded by the people of Utah, who were familiar with the ways of the Mormon high-priesthood, as being, under the circumstances, equivalent to an indorsement and made it impossible for anyone else to become an aspirant for the same position with any hope of success.

A PRACTICAL UNION OF CHURCH AND STATE.

The fact that the adherents of the Mormon Church hold the balance of power in politics in some of the States enables the first presidency and twelve apostles to control the political affairs of those States to any extent they may desire. Thus a complete union of church and state is formed. This is in accordance with the teachings of the priesthood of the Mormon Church, as promulgated in the writings of men of high authority in the church, to the effect that the church is supreme in all matters of Government as well as in all things pertaining to the private life of the citizen. In one of a series of pamphlets, "On the Doctrines of the Gospel," by Apostle Orson Pratt, it is affirmed:

"The kingdom of God is an order of government established by divine authority. It is the only legal government that can exist in any part of the universe. All other governments are illegal and unauthorized. God having made all beings and worlds has the supreme right to govern them by His own laws and by officers of His own appointment. Any people attempting to govern themselves and by laws of their own making and by officers of their own appointment are in direct rebellion against the Kingdom of God." (Vol. 1, p. 666.)

The union of church and state in those States under the domination of the Mormon leaders is most abhorrent to our free institutions. John Adams declared that the attempt of the Church of England to extend its jurisdiction over the colonies "contributed as much as any other cause to arouse the attention, not only of the inquiring mind, but of the common people, and to urge them to close thinking of the constitutional authority of Parliament over the colonies² and to bring on the war of independence. After the colonies had achieved their independence, the complete enfranchisement of the church from the control of the state and of the state from the control of the church was brought about through the efforts of men like Thomas Jefferson and James Madison in Virginia and those of almost equal prominence in other States. And thus the natural desire of the people of this nation for the entire separation of church and state was incorporated in the Constitution of the United States by the first amendment to that instrument.

The right to worship God according to the dictates of one's own conscience is one of the most sacred rights of every American citizen. No less sacred is the right of every citizen to vote according to his conscientious convictions without interference on the part of any church, religious organization, or body of ecclesiastics which seeks to control his political opinions or direct in any way his use of the elective franchise.

In the interest of religious freedom and to protect the State from the influence of the Mormon Church, the framers of the constitution of Utah incorporated in that instrument the provision which has been quoted in a preceding part of this report. That provision of the constitution of Utah has been persistently and contemptuously disregarded by the first presidency and the twelve apostles of the Mormon Church ever since Utah was admitted into the Union. They have paid as little regard to this mandate of the constitution of Utah as they have to the law which prohibits polygamy and the law which prohibits polygamous cohabitation.

The minority say, as to Mr. Smoot's connection with the church:

So far as mere belief and membership in the Mormon Church are concerned, he is fully within his rights and privileges under the guaranty of religious freedom given by the Constitution of the United States, for there is no statutory provision, and could not be, prohibiting either such belief or such membership.

Moreover, having special reference to the Mormons residing in Utah and their peculiar belief, it was provided in the act of Congress passed July 16, 1894, that the people of Utah should provide in their constitution "by ordinance irrevocable without the consent of the United States and the people of said States—

"1. That perfect toleration of religious sentiment shall be secured, and that no inhabitants of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited."

In consequence there was embodied in the constitution of the State of Utah a compliance with this requirement, and thereupon the Territory was duly admitted as a State of the Union.

Accordingly, members of the Mormon Church, open and avowed believers in its doctrines and teachings, have been admitted without question to both Houses of Congress as Representatives of the State.

(4) The committee next discuss the oath alleged to be inconsistent with Mr. Smoot's duties as a Senator:

In the protest signed and verified by the oath of Mr. Leilich it is claimed that Mr. Smoot has taken an oath as an apostle of the Mormon Church which is of such a nature as to render him incompetent to hold the office of Senator. From the testimony taken it appears that Mr. Smoot has taken an obligation which is prescribed by the Mormon Church and administered to those who go through a ceremony known as "taking the endowments." It was testified by a number of witnesses who were examined during the investigation that one part of this obligation is expressed in substantially these words:

"You and each of you do covenant and promise that you will pray and never cease to pray Almighty God to avenge the blood of the prophets upon this nation, and that you will teach the same to your children and to your children's children unto the third and fourth generation."

An effort was made to destroy the effect of the testimony of three of these witnesses by impeachment of their reputation for veracity. This impeaching testimony was not strengthened by the fact that

the witnesses by whom it was given were members of the Mormon Church and would naturally disparage the truthfulness of one who would give testimony unfavorable to that church. The testimony of the witnesses for the protestants, before referred to, was corroborated by the testimony of Mr. Dougall, a witness sworn in behalf of Mr. Smoot, and no attempt was made to impeach the character of this witness. It is true that a number of witnesses testified that no such obligation is contained in the endowment ceremony; but it is a very suspicious circumstance that every one of the witnesses who made this denial refused to state the obligation imposed on those who take part in the ceremony.

The evidence showing that such an obligation is taken is further supported by proof that during the endowment ceremonies a prayer is offered asking God to avenge the blood of Joseph Smith upon this nation, and certain verses from the Bible are read which are claimed to justify the obligation and the prayer. The fact that such a prayer, if offered, and that such passages from the Bible are read was not disputed by any witness who was sworn on the investigation. Nor was it questioned that by the term "the prophets" as used in the endowment ceremony reference is made to Joseph and Hyrum Smith.

That an obligation of vengeance is part of the endowment ceremony is further attested by the fact that shortly after testimony had been given on that subject before the committee Bishop Daniel Connelly of the Mormon Church denounced the witnesses who had given this testimony as traitors who had broken their oaths to the church.

The fact that an oath of vengeance is part of the endowment ceremonies and the nature and character of such an oath was judicially determined in the third judicial court of Utah in the year 1889, in the matter of the application of John Moore and others to become citizens of the United States. In an opinion denying the application the court say:

"In these applications the usual evidence on behalf of the applicants as to residence, moral character, etc., was introduced at a former hearing and was deemed sufficient. Objection was made, however, to the admission of John Moore and William J. Edgar upon the ground that they were members of the Mormon Church, and also because they had gone through the endowment house of that church and there had taken an oath or obligation incompatible with the oath of citizenship they would be required to take if admitted. * * *

"Those objecting to the right of these applicants to be admitted to citizenship introduced eleven witnesses who had been members of the Church of Jesus Christ of Latter-Day Saints, commonly called the 'Mormon Church.' Several of these witnesses had held the position of bishop in the church, and all had gone through the endowment house and participated in its ceremonies. The testimony of these witnesses is to the effect that every member of the church is expected to go through the endowment house, and that nearly all do so; that marriages are usually solemnized there, and that those who are married elsewhere go through the endowment ceremonies at as early date thereafter as practicable, in order that the marital relations shall continue throughout eternity.

"On behalf, of the applicants fourteen witnesses testified concerning the endowment ceremonies, but all of them declined to state what oaths are taken, or what obligations or covenants are there entered into, or what penalties are attached to their violation; and these witnesses, when asked for their reason for declining to answer, stated that they did so 'on a point of honor,' while several stated they had forgotten what was said about avenging the blood of the prophets. * * *

"The witnesses for the applicants, while refusing to disclose the oaths, promises, and covenants of the endowment ceremonies and the penalties attached thereto, testified generally that there was nothing in the ceremonies inconsistent with loyalty to the Government of the United States, and that the Government was not mentioned. One of the objects of this investigation is to ascertain whether the oaths and obligations of the endowment house are incompatible with good citizenship, and it is not for applicants' witnesses to determine this question. The refusal of applicants' witnesses to state specifically what oath, obligations, or covenants are taken or entered into in the ceremonies renders their testimony of but little value, and tends to confirm rather than contradict the evidence on this point offered by the objectors. The evidence established beyond any reasonable doubt that the endowment ceremonies are inconsistent with the oath an applicant for citizenship is required to take, and that the oaths, obligations, or covenants there made or entered into are incompatible with the obligations and duties of citizens of the United States." (Vol. 4, pp. 340-343.)

The obligation hereinbefore set forth is an oath of disloyalty to the Government which the rules of the Mormon Church require, or at least encourage, every member of that organization to take.

It is in harmony with the views and conduct of the leaders of the Mormon people in former days, when they openly defied the Government of the United States, and is also in harmony with the conduct of those who give the law to the Mormon Church today in their defiant disregard of the laws against polygamy and polygamous cohabitation. It may be that many of those who take this obligation do so without realizing its treasonable import; but the fact that the first presidency and twelve apostles retain an obligation of that nature in the ceremonies of the church shows that at heart they are hostile to this nation and disloyal to its Government.

And the same spirit of disloyalty is manifested also in a number of the hymns contained in the collection of hymns put forth by the rulers of the Mormon Church to be sung by Mormon congregations.

There can be no question in regard to the taking of the oath of vengeance by Mr. Smoot. He testified that he went through the ceremony of taking the endowments in the year 1880, and the head of the Mormon Church stated in his testimony that the ceremony is now the same that it has always been.

An obligation of the nature of the one before mentioned would seem to be wholly incompatible with the duty which Mr. Smoot as a member of the United States Senate would owe to the nation. It is difficult to conceive how one could discharge the obligation which rests upon every Senator to so perform his official duties as to promote the welfare of the people of the United States and at the same time be calling down the vengeance of heaven on this nation because of the killing of the founders of the Mormon Church sixty years ago.

The minority say on this point:

As to the "endowment oath," it is sufficient in this summary to say that the testimony is collated and analyzed in the annexed statement, and thereby shown to be limited in amount, vague and indefinite in character, and utterly unreliable, because of the disreputable and untrustworthy character of the witnesses.

There were but seven witnesses who made any pretenses of testifying about any such obligation. One of these was shown by the testimony of two uncontradicted witnesses to be mentally unsound. Another, to have committed perjury in the testimony given before the committee on another point. The third was shown by the uncontradicted testimony of a number of witnesses to have a bad reputation for truth and veracity, and to be thoroughly unreliable. A fourth admitted that he had been for years intemperate, and was shown by indisputable testimony to have lost his position on that account, and thereupon and for that reason to have withdrawn from the church and to have assumed such a hostile and revengeful attitude as to entirely discredit him as a reliable witness. The other three witnesses were so indefinite as to their statements that their testimony amounted at most to nothing more than an attempt to state an imperfect and confessedly uncertain recollection.

All that it is attempted to show as to the character of this oath is positively contradicted by Reed Smoot and a great number of witnesses, whose standing and character and whose reputation for truth and veracity are unquestioned, except only in so far as their credibility may be affected by the fact that they are or have been members of the Mormon Church.

Upon this state of evidence we are of opinion that no ground has been established on which to predicate a finding or belief that Mr. Smoot ever took any obligation involving hostility to the United States, or requiring him to regard his allegiance to the Mormon Church as paramount to his allegiance and duty to the United States.

(5) As to the charge that Mr. Smoot was a polygamist, the majority report says:

In the protest signed by Mr. Leilich alone it was charged that Reed Smoot is a polygamist, and that, as an apostle of the Church of Jesus Christ of Latter-Day Saints, commonly called the "Mormon Church," he had taken an oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator." No one appeared, however, to sustain either of these charges. No evidence has been offered in support of either of them, but, on the contrary, both charges were refuted by a number of witnesses.

The minority say:

Aside from his connection with the Mormon Church, so far as his private character is concerned, it is, according to all the witnesses, irreproachable, for all who testify on the subject agree or concede

that he has led and is leading an upright life, entirely free from immoral practices of every kind. He is not a polygamist; has never had but one wife, and has been noted from early manhood for his opposition to plural marriages, and probably did as much as any other member of the Mormon Church to bring about the prohibition of further plural marriages.

In accordance with the above considerations, the majority summarize their conclusions as follows:

The more deliberately and carefully the testimony taken on the investigation is considered, the more irresistably it leads to the conclusion that the facts stated in the protest are true; that Mr. Smoot is one of a self-perpetuating body of men, known as the first presidency and twelve apostles of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church; that these men claim divine authority to control the members of said church in all things, temporal as well as spiritual; that this authority is, and has been for several years past, so exercised by the said first presidency and twelve apostles as to encourage the practice of polygamy and polygamous cohabitation in the State of Utah and elsewhere, contrary to the constitution and laws of the State of Utah and the law of the land; that the said first presidency and twelve apostles do now control, and for a long time past have controlled, the political affairs of the State of Utah, and have thus brought about in said State a union of church and state, contrary to the constitution of said State of Utah and contrary to the Constitution of the United States, and that said Reed Smoot comes here, not as the accredited representative of the State of Utah in the Senate of the United States, but as the choice of the hierarchy which controls the church and has usurped the functions of the State in said State of Utah.

It follows, as a necessary conclusion from these facts, that Mr. Smoot is not entitled to a seat in the Senate as a Senator from the State of Utah, and your committee report the following resolution:

Resolved, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

The minority declared, in addition to the positions taken above, that—

Reed Smoot possesses all the qualifications prescribed by the Constitution to make him eligible to a seat in the Senate, and the regularity of his election by the legislature of the State of Utah is not questioned in any manner.

And made no recommendation for action.

483. The Senate case of Reed Smoot continued.

The Senate declined to exclude Reed Smoot for alleged disqualifications other than those specified in the Constitution.

The Senate apparently held the view that Reed Smoot might be deprived of his seat only by the two-thirds vote specified by the Constitution for expulsion.

Final arguments in the Smoot case as to what are the constitutional qualifications of a Senator.

The consideration of the resolution declaring Mr. Smoot entitled to his seat proceeded at intervals during the second session of the Fifty-ninth Congress.

On Febriary 14, 1907,¹ Mr. Philander C. Knox, of Pennsylvania, in debating the resolution, said:

Mr. President, the Constitution provides that the Senate shall be the judge of the qualifications of its members; a majority of the Senate can determine whether or not a Senator possesses them. The Constitution also provides that the Senate may, with the concurrence of two-thirds, expel a Member.

I have intentionally referred to the proposed action against Senator Smoot as expulsion. I do not think the Senate will seriously consider that any question is involved except one of expulsion, requiring

¹ Second session Fifty-ninth Congress, Record, p. 2934.

a two-thirds vote. There is no question as to Senator Smoot possessing the qualifications prescribed by the Constitution, and therefore we can not deprive him of his seat by a majority vote. He was at the time of his election over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, "These are not enough; we require other qualifications," or to say that we can not trust the judgment of States in the selection of Senators, and we therefore insist upon the right to disapprove them for any reason.

This claim of right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the States have notice at the time of selecting their Senators, but it is said to be absolute in each case as it arises, uncontrolled by any canon or theory whatever.

Anyone who takes the trouble to examine the history of the clause of the Constitution as to the qualification of Senators must admit that it was the result of a compromise. The contention that the States should be the sole judges of the qualifications and character of their representatives in the Senate was acceded to with this limitation: A Senator must be 30 years of age, nine years a citizen of the United States, and an inhabitant of the State from which he is chosen. Subject to these limitations imposed by the Constitution, the States are left untrammelled in their right to choose their Senators. This constitutional provision secures a measure of maturity in counsel, and at least a presumption of interest in the welfare of the Nation and State.

By another provision—namely, that relating to expulsion—the Constitution enables the Senate to protect itself against improper characters by expelling them by a two-thirds vote if they are guilty of crime, offensive immorality, disloyalty, or gross impropriety during their term of service.

I specify these reasons because I can not imagine the Senate expelling a member for a cause not falling within one of them.

* * * * *

I know of no defect in the plain rule of the Constitution for which I am contending. I know of no case it does not reach. I can not see that any danger to the Senate lies in the fact that an improper character can not be expelled without a two-thirds vote. It requires the unanimous vote of a jury to convict a man accused of crime: it should require, and I believe that it does require, a two-thirds vote to eject a Senator from his position of honor and power, to which he has been elected by a sovereign State.

The simple constitutional requirements of qualification do not in any way involve the moral quality of the man; they relate to facts outside the realm of ethical consideration and are requirements of fact easily established. Properly enough, therefore, as no sectional, partisan, or religious feeling could attach itself to an issue as to whether or not a man is 30 years of age, had been a citizen of the United States and an inhabitant of a State for the periods prescribed, the decision as to their existence rests with a majority of the Senate. When, however, a different issue is raised, dehors the Constitution, upon allegations of unfitness, challenging the moral character of a Senator, involving a review of questions considered and settled in the Senator's favor by the action of his State in electing him, then the situation is wholly changed, and a different function is to be performed by the Senate, calling for its proper exercise the highest delicacy and discretion in reviewing the action of another sovereignty.

If I were asked to state concisely the true theory of the Constitution upon this important point, I would unhesitatingly say:

First. That the Constitution undertakes to prescribe no moral or mental qualification, and in respect to such qualifications as it does prescribe the Senate by a majority vote shall judge of their existence in each case, whether the question is raised before or after the Senator has taken his seat.

Second. That as to all matters affecting a man's moral or mental fitness the States are to be the judges in the first instance, subject, however, to the power of the Senate to reverse their judgment by a two-thirds vote of expulsion when an offense or an offensive status extends into the period of Senatorial service, and such a question can only be made after the Senator has taken his seat.

If to this it is objected that it contemplates admitting a man who may be immediately expelled, I reply that it is hardly proper to adopt a rule of constitutional construction and Senatorial action based upon the theory that the States will send criminals or idiots to the Senate. Besides, it does not seem to me to be conceding much to a State, after it has deliberately and solemnly elected a Senator after the fullest consideration of his merits, to concede on the first blush of the business the State's intelligent and honorable conduct by allowing its chosen representative admission to the body to which he is accredited.

On February 20,¹ Mr. Julius C. Burrows, of Michigan, said:

Under the first head it is insisted that the Senate, in examining into the qualifications of a Senator, is restricted in its inquiry to the question of age, citizenship, and residence, and beyond that the inquiry can not go, and no other qualifications can be imposed. The junior, Senator from Illinois, in his very able speech, said upon this point:

"The power that is given to the Senate under the Constitution is not to create Senators, but to judge of their qualifications. The States create the Senators. The qualifications to be judged are those I have already stated, prescribed in the Constitution itself. If the Senate find those qualifications exist for the applicant for a seat in this body from any given State, then under all precedents such Senator is entitled to take the oath of office and take his place among the Members of this great legislative body."

If such contention can be maintained, that ends the controversy, for no one questions but that the senior Senator from Utah has, in the language of the Constitution, "attained to the age of 30 years, been nine years a citizen of the United States, and is an inhabitant of the State from which he is chosen."

If the possession of these attributes constitutes the "be all and end all" of the qualifications of a Senator, then is the Senate helpless indeed. If this contention be sound, then Joseph F. Smith, the head of this organization to which the Senator belongs, possessing, as he does, the constitutional qualifications of age, citizenship, and residence, would be entitled to admission to this body if elected by the legislature of Utah, and his five wives and forty-three children could witness from the galleries of the Senate his triumphal entry, unquestioned and unopposed, into the membership of this august assembly.

It is impossible for me to give assent to such doctrine, and I have been unable to find it sustained either in reason or upon authority, and the contention is resisted both upon principle and precedent and can, in my judgment, find no warrant in either.

I submit that the provision of section 3, Article 1, was not inserted with the purpose of determining or fixing the qualifications of Senators, but it was ingrafted into the Federal Constitution expressly as a limitation upon the power of the States in making selection of Senators, restricting the choice to a certain class of its citizens. It excluded a certain class as being ineligible to the office of Senator. The purpose of it was to correct an evil which had grown up during the years of the Continental Congress and the Congress of the Confederation. It was for the purpose of insuring a national Congress for the new Government to be composed of a body of men of mature judgment, residents of the State or district, and thoroughly American.

Noah Webster said, speaking of the leading principles of the Federal Constitution:

"A man must be 30 years of age before he can be admitted into the Senate, which was likewise a requisite in the Roman Government. The places of Senators are wisely left open to all persons of suitable age and merit, and who have been citizens of the United States for nine years, a term in which foreigners may acquire the feelings and acquaint themselves with the interests of the native Americans."

A brief reference to the facts of history will suffice to show the exigency which called this constitutional provision into existence.

Under the Continental Congress and the Congress of the Confederation there were no restrictions as to age, residence, or citizenship, except such as the various colonies or States saw fit to impose, and which were as varied as the number of colonies or States, and of the 348 different individuals from the thirteen colonies who held seats in the Continental Congress and the Congress of the Confederation from 1774 to 1788, the ages of the delegates varied from 16 to 76 years. Charles Pinckney, of North Carolina, a member of the Continental Congress, was but 19 years of age when elected to that body, and James Sykes, of Delaware, also of the Continental Congress, was only 16 years old when elected to Congress, and twenty-five members of that body were under 30 years of age.

With these examples before them, it was deemed wise to place some restrictions in the Federal Constitution upon the power of the States in their choice of Senators and Representatives to the Federal Congress.

* * * * *

I repeat, therefore, that this provision of the Constitution was evidently intended to be nothing more than a statement of a few of the many disqualifications which would or might render one unfit to hold the office of a Senator and to make ineligible all persons laboring under the disabilities named, and leaving the question of qualifications in other respects to be determined by the Senate according to the

¹ Record, pp. 3418, 3419, 3420.

facts in each particular case, under the right conferred by the Constitution to judge of the qualifications of its own members. To contend otherwise would be to assert that the fathers who framed our Constitution deliberately intended that an idiot, a lunatic, an enemy of the Government, or a notorious criminal must be allowed a place in the Senate if of proper age, residence, and citizenship. I submit that no such interpretation of that clause of the Constitution is justifiable or reasonable, and that the provision in question must be interpreted as being a limitation, to a certain extent, upon the powers of the State in choosing members to the Senate. This contention, I insist, is sustained not only in reason, but upon authority.

Mr. Burrows then referred to the cases of Niles, Thomas, and Roberts; and continued:

Mr. President, it is contended in behalf of Senator Smoot that even if it were to be conceded that the Senate would have a right to inquire into the qualifications of Senator Smoot as regards his past history, his associations, his acts, and his fitness to be a Senator from the State of Utah, still Mr. Smoot, having taken the oath of office as a Senator, can not be excluded from the Senate or in any way be removed from this body except by expulsion, requiring a two-thirds vote. It is proposed, as I understand, to amend this resolution so as to require a two-thirds vote by inserting, after the word "Resolved," the words "two-thirds of the Senate concurring," and thereby to erect an additional barrier behind which the Senator from Utah may take refuge.

It is admitted that if the status of Senator Smoot at the time he presented himself for admission in this body would have justified his exclusion, then the same status or condition continuing until this time would justify his removal. However, I have no desire to discuss at length that question, because to my mind it is not material.

In the Senate, whenever one has presented himself claiming the right to a seat in that body with credentials which upon their face were fair and regular in form but whose right to a seat was challenged for any reason, the almost uniform practice has been to admit him to a seat and inquire into his qualifications afterwards. Such was the course pursued in the case of Albert Gallatin, of Pennsylvania, in 1793; of Asher Robbins, of Rhode Island, in 1833; of James Shields, of Illinois, in 1849; of James Harlan, of Iowa, in 1853, and in a great number of other cases which might be cited.

On the same day¹ the question recurred on the resolution recommended by the committee:

Resolved, That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

Mr. Albert J. Hopkins, of Illinois, proposed a substitute amendment, to strike out all after the word "Resolved" and insert a new text, so that it should read as follows:

Resolved (two-thirds of the Senators present concurring therein), That Reed Smoot is not entitled to a seat as a Senator of the United States from the State of Utah.

The amendment of Mr. Hopkins was agreed to—yeas 49, nays 22.

Thereupon Mr. Edward W. Carmack, of Tennessee, proposed a substitute as follows:

Resolved, That Reed Smoot, a Senator from Utah, be expelled from the Senate of the United States.

This substitute was disagreed to—yeas 27, nays 43.

Then the resolution of the committee as amended on motion of Mr. Hopkins was disagreed to—yeas 28, nays 42—two-thirds not voting in favor thereof.

¹ Record, pp. 3428–3430.

484. Discussion by a House committee as to the power of the House to impose qualifications not enumerated in the Constitution.—On February 27, 1899,¹ Mr. Adin B. Capron, of Rhode Island, submitted a report from the Committee on Election of President, Vice-President, and Representatives in Congress, which contained this discussion:

If the constituted authorities of a State fail, either willfully or after the exercise of every legal process, to enforce and maintain its laws against polygamous or plural marriages or unlawful cohabitation, and such failure results in the election to Congress of a person who is a polygamist, but who is qualified under the Constitution of the United States, the question of eligibility would not thereby be necessarily raised, but it could at least serve to show the lack of power on the part of each House of Congress to deal with such a condition, except in one way, namely, by admission to membership followed by expulsion.

The Constitution, Article I, section 5, constitutes each House the judge of the "elections, returns, and qualifications of its own members." The qualifications of Senators and Representatives are prescribed by the Constitution as follows:

"No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." (Art. I, sec. 2, par. 2)

"No person shall be a Senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." (Art. I, sec. 3, par. 3.)

One notable case only need be cited to show the operation of those provisions—that of Albert Gallatin, of Pennsylvania, whose election was declared void by the Senate on the ground that he had not been a citizen of the United States the term of years required as a qualification to be a Senator of the United States. (Senate Journal, first session Third Congress, p. 37.)

It will be seen that, the qualifications of Senators and Representatives being fixed by the Constitution, it is only within the power of each House to determine whether a person otherwise entitled to a seat possesses those qualifications and no more. Should the person possess those qualifications and the question be raised that he is ineligible in another or other respects—for instance, that he is a polygamist in violation of the laws of his State—is a question which it is generally conceded (the case being hypothetical and, we believe, never having been actually raised) neither House would have the right to entertain. The case of *George Q. Cannon v. Allen G. Campbell*, in the Forty-seventh Congress, presents features resembling the hypothetical one stated, but that case originated in the Territory of Utah, over which the laws of the United States extended, while in the one under consideration we are dealing with the States and the limitations placed upon Congress by the Constitution to judge of the qualifications of its members duly elected by the States.

In the case of *Cannon v. Campbell* the conclusion was reached that the contestant having admitted that he has plural wives and that he teaches and advises others to the commission of that offense, he should be excluded from the House, and contestant having only received a minority of the votes cast was not elected, and the seat was declared vacant. (See House Report 559 and House Journal, first session Forty-seventh Congress, p. 1074.)

The distinction should be clearly noted between this case and one growing out of a State.

In a hypothetical case of the kind presented above what could either House of Congress legitimately do? Your committee do not feel it is their right, even if they were so disposed, to volunteer an answer to the question. The author of the so-called "Edmunds Act," an acknowledged constitutional lawyer of great ability, recently expressed the opinion in the press that in such a case the House would have to admit the Representative-elect to membership and then, if it saw fit, expel him, as permitted by Article I, section 5, paragraph 2 of the Constitution. This would be the only power left to either House, the exercise of which would require the concurrence of two-thirds. (For action by both Houses expelling members see cases of *Jesse D. Bright*, *John C. Breckinridge*, *Trusten Polk*, and *Waldo P. Johnson*, Senate Journal, second session Thirty-seventh Congress, pp. 23, 97, 98, 176; and *John B. Clark* and *John W. Reid*, House Journal, second session Thirty-seventh Congress, pp. 8, 75.)

¹ Third session Fifty-fifth Congress, Report No. 2307.